

# PENDING NOMINATIONS

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## HEARING

BEFORE THE

### COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

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NOMINATION OF DENNIS D. KIRK NOMINATED TO BE CHAIRMAN,  
MERIT SYSTEMS PROTECTION BOARD, HON. JULIA A. CLARK  
NOMINATED TO BE A MEMBER, MERIT SYSTEMS PROTECTION BOARD,  
ANDREW F. MAUNZ NOMINATED TO BE A MEMBER, MERIT SYSTEMS  
PROTECTION BOARD AND CARMEN G. MCLEAN NOMINATED TO BE AN  
ASSOCIATE JUDGE, SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

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## NOMINATION HEARING

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THURSDAY, JULY 19, 2018

U.S. SENATE,  
COMMITTEE ON HOMELAND SECURITY  
AND GOVERNMENTAL AFFAIRS,  
*Washington, DC.*

The Committee met, pursuant to notice, at 10:04 a.m., in room 342, Dirksen Senate Office Building, Hon. James Lankford presiding.

Present: Senators Lankford, McCaskill, Heitkamp, Peters, Hassan, and Harris.

### OPENING STATEMENT OF SENATOR LANKFORD<sup>1</sup>

Senator LANKFORD. Good morning, everyone. Today we will consider the nominations of Dennis Kirk, Julia Clark, Andrew Maunz to be a Members of the Merit Systems Protection Board (MSPB). We will also consider the nomination of Carmen McLean to be an Associate Judge of the Superior Court for the District of Columbia. The Committee takes these nominations very seriously and we are pleased to have all of you appearing before us today. For all of you this was a long journey to be able to get to this spot, and there is still time to go.

Dennis D. Kirk, originally of Kansas, earned a Bachelor of Science from Northern Arizona University and his J.D. from Washburn University's School of Law. Upon graduation, he moved to the Washington area and began working for the Interstate Commerce Commission. Mr. Kirk left government service to practice law in private practice in Northern Virginia for almost three decades before rejoining the Federal Government in 2005.

From 2005 until 2012, Mr. Kirk worked at the Pentagon for the Department of the Army, where he was recognized with multiple awards, including the Special Act or Service Award for saving the Army millions of dollars.

The Honorable Julia Akins Clark is originally from the Shawnee, Oklahoma, area, down the street from my house. She graduated from Oklahoma Baptist University (OBU), which is a fine institution, with a B.A. in political science and then proceeded on to the American University's Washington College of Law where she earned her J.D. in 1980, but I am sure it was not as good as her time at OBU.

After completing law school, Ms. Clark also went on to work for the Federal Government, joining the U.S. Department of Justice

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<sup>1</sup> The prepared statement of Senator Lankford appears in the Appendix on page 21.

(DOJ). After 5 years of public service, she went into private law practice here in the Washington, DC. area, before moving on to work briefly for the National Coalition for the Homeless. Ms. Clark worked as the Counsel for the International Federation of Professional and Technical Engineers for over two decades before being nominated and confirmed twice during the Obama Administration to serve as the General Counsel of Federal Labor Relations Authority (FLRA). Ms. Clark currently serves in the congressional Office of Compliance.

Andrew Maunz of Maryland is also nominated to serve as a Member of the MSPB. A native of Cincinnati, Ohio, Mr. Maunz received his Bachelor of Science from Miami University in Ohio in 2005, and then attended the University of Toledo College of Law, earning his J.D. in 2008. Like his fellow MSPB nominees, Mr. Maunz joined the Federal Government upon completion of law school. Mr. Maunz has worked as an attorney in the Office of General Counsel (OGC) at the Social Security Administration (SSA) since 2008. He currently serves the agency as a senior attorney and has represented the agency in employment litigation before administrative agencies, including the MSPB.

Carmen McLean is appearing before us today as a nominee to be the Associate Judge of the Superior Court of the District of Columbia. Ms. McLean was originally from Oregon, graduated with a Bachelor of Science at George Fox University in 1998. She earned her J.D. from Georgetown University Law Center in 2001. Ms. McLean is a partner at Jones Day here in D.C. She has extensive experience in contracts, torts, anti-trust law. She has also developed expertise in civil procedure and discoveries, especially discovery practices relating to new technologies and social media.

I would be remiss if I did not mention Ms. McLean's tremendous work on behalf of at-risk children in Washington, DC. Ms. McLean has been active with the Children's Law Center and has provided thousands of hours of pro bono work to help individuals and families who want to provide a safe and permanent home for at-risk children. In this work, Ms. McLean was named, in 2012, Pro Bono Lawyer of the Year by the D.C. Bar Association. Thank you for your work for the community and for those kids.

Committee staff has reached out to a variety of these nominees' colleagues and affiliates, who spoke highly of them, you will be glad to know. You came very highly recommended by the people who work with you and know you the best. Committee staff has also had the opportunity to interview all the nominees on an array of issues. They have thoughtfully and competently answered each question, and I look forward to speaking with you more today on your experience and accomplishments and how you intend to bring them to bear in a fair and impartial manner on the Merit System Protection Board and for the District of Columbia.

We also look forward to meeting your families publicly and hope that you will take the opportunity to be able to introduce them when you are recognized to speak.

With that I recognize Ranking Member Peters for an opening statement.

### OPENING STATEMENT OF SENATOR PETERS<sup>1</sup>

Senator PETERS. Well, thank you, Mr. Chairman, and thank you to each of the nominees for your willingness to serve.

Ms. McLean, you have a rare distinction of being nominated to the bench by both President Obama and President Trump. I would certainly love to hear how you managed to do that. It is a great relief to see that we have a judicial nomination without rancor or without controversy, and I hope you do not feel left out if you may not get a whole lot of questions here today. I am sure you will be OK with that as well.

Today we are also considering three candidates for appointment to the Merit Systems Protection Board, which, as its name suggests, has the core function of safeguarding the merit-based system of governance. In a merit-based system, jobs to civil servants are not handed out based on political backgrounds or financial contributions. Instead, employees must be hired and retained based on their skills and effectiveness in carrying out the many Federal services that our communities rely on. Whether it is securing our borders, assisting our veterans, or protecting the environment, we need to ensure the Federal Government is pulling from a wide variety and a diverse talent pool of Americans who are dedicated to work hard for the public.

This is a long-term strategy, and presidents, their cabinets and legislatures will come and go. A stable civil service is essential for maintaining a level of consistency, reliability, and competence in the American Government, regardless of where the political winds may be blowing at the time.

The Merit Systems Protection Board was established in the same legislation that codified a framework for merit-based workforce. The Merit System Principles and Prohibited Personnel Practices laid out in the Civil Service Reform Act (CSRA) provides us with the necessary ingredients for protecting and preventing our civil service from becoming a system of political patronage.

The principals include common-sense worker protections, like equal opportunity, retention based on job performance and fair pay. They rightfully prohibit employees from taking personal actions based on anything other than an individual's qualifications, performance, and suitability for public service. Importantly, they also prohibit retaliation against whistleblowers who lawfully disclose instances of waste, fraud, and abuse.

With over two million employees, the Federal Government is a large and often cumbersome entity, but the Merit System Principles set a critical foundation for accountability, and while protecting this framework we should also diligently try to identify opportunities to make the workforce more efficient.

The MSPB can play a role in this. The Board is tasked with upholding the Merit System Principles through the precedents it takes in adjudicating cases and by taking proactive steps through civil service studies and review of the Office of Personnel Management (OPM) rules.

As we consider your nominations, the question of how you will reinforce the merit system and promote an effective Federal work-

<sup>1</sup> The prepared statement of Senator Peters appear in the Appendix on page 23.

force is central to this conversation, especially given the unfair and, frankly, harmful sensationalized attacks of our civil service. We should approach these issues mindful that we have been entrusted as stewards of taxpayer dollars and that we will work together so the government works for everyone.

I look forward to your testimony. And, Mr. Chairman, prior to their testimony, if I could enter into the record with two letters, one from the National Treasury Employees Union<sup>1</sup> and the second letter, signed by a variety of labor organizations.<sup>2</sup>

Senator LANKFORD. Without objection.

It is the custom of this Committee to swear in all witnesses that appear before us, so if you do not mind I would ask all four of you to stand and raise your right hand.

Do you swear the testimony that you will give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. KIRK. I do.

Ms. CLARK. I do.

Mr. MAUNZ. I do.

Ms. MCLEAN. I do.

Senator LANKFORD. Thank you. You may be seated. Let the record reflect that all witnesses answered in the affirmative.

I want to recognize all of you one at a time for your opening statements, and I would encourage you to be able to introduce your family, and we do that as well so we can get to know you better. One of the challenges of this process is the family that goes through this long, painful process with you. So thank you for doing that.

Mr. Kirk, you are recognized first.

**TESTIMONY OF DENNIS D. KIRK,<sup>3</sup> NOMINATED TO BE  
CHAIRMAN, MERIT SYSTEMS PROTECTION BOARD**

Mr. KIRK. Thank you, Chairman Lankford, Ranking Member Senator Peters, and Senator Hassan. Thank you for the opportunity to appear before you on my hearing for confirmation to serve as a Member and the Chairman of the Merit Systems Protection Board.

I would like to introduce my family: my son, Dean, in his final year of law school at Washburn University; My brother, Colonel Donald R. Kirk, who spent 32 years in service to our country; my intern, Oriet Hemenway, who is here observing how our government works.

My thanks to the Honorable Tom Davis, my friend of over three decades, for his supporting statement he submitted to the Committee, and I will ask its admission into the record.<sup>4</sup> Tom appointed me to the Fairfax County, Virginia, Consumer Protection Commission, where I am now on my 36th year of service, and Penny Gross, my Mason District Supervisor, keeps putting me on it.

The Merit Systems Protection Board protects 2.2 million Federal employees by conducting fair and neutral case adjudications, regu-

<sup>1</sup>The letter referenced by Senator Peters appear in the Appendix on page 150.

<sup>2</sup>The letter referenced by Senator Peters appear in the Appendix on page 260.

<sup>3</sup>The prepared statement of Mr. Kirk appears in the Appendix on page 25.

<sup>4</sup>The letter referenced by Mr. Kirk appears in the Appendix on page 94.



latory reviews, and independent government studies to improve the workforce. In conjunction with the Office of Personnel Management and Office of Special Counsel (OSC), it protects the Merit System Principles and prevents Prohibited Personnel Practices. The Constitution, U.S. Code, Code of Federal Regulations, and precedents of the MSPB and the U.S. courts all guide our Board, assuming confirmation—not presuming confirmation—in reaching decisions on the original, the appellate, and the specialized jurisdiction areas.

The MSPB has a backlog now of about 1,250 cases awaiting decision because no voting board quorum exists. It literally is the elephant in the room. If the nominees are confirmed, it initiates the process toward delivering fair and equitable justice to waiting Federal employees. Employees reporting violations of law, waste, fraud, abuse, rules and regulations, mismanagement, and specific substantial dangers to public safety will receive our Board's full help, such as protecting whistleblowers against undue retaliation or retribution for their coming forward to help our government.

If confirmed, in collegial collaboration with my fellow board members and the excellent staff we have at the MSPB, I pledge to ensure the Board will deliver governmentwide studies to advise and protect the merit system by analyzing the health of the workforce, offer best practices, seek modernization of the workforce, and ensure fair treatment and safety for whistleblowers, and that will insure a workplace free from Prohibited Personnel Practices.

As a proven strategic initiator of innovation, if confirmed I will develop creative, rapidly effective solutions to complex problems. For example, I will recruit, hire, train, educate, and deploy into the MSPB, and thus into our government service, the very best qualified diverse pool of Federal workers. This will assure fair pay with excellent treatment for all employees, so they can exhibit the highest standards of integrity while conducting public service. Literally, a fair day's pay for a fair day's work.

The Secretary of the Army created a position in the Office of General Counsel. I was its first Associate General Counsel for Strategic Integration and Business Transformation. My responsibilities were to create, design, and build out a modern business transformation and modernization for the Army, and especially for the General Counsel. I developed efficient, economical improvements in civilian/military operational and personnel systems. This saved millions of dollars for the taxpayers. Such incredibly difficult challenges could not have been accomplished without the support of our excellent team of excellent public servants.

It is a great honor and privilege to again hear the call to serve our United States of America, especially in such a challenging and noble function. I am happy to take any questions, and answer within my best abilities and present knowledge about the MSPB.

Thank you, Senators, and welcome, Senator McCaskill.

Senator LANKFORD. Thank you, Mr. Kirk. Ms. Clark.

**TESTIMONY OF THE HONORABLE JULIA A. CLARK,<sup>1</sup> NOMINATED TO BE A MEMBER, MERIT SYSTEMS PROTECTION BOARD**

Ms. CLARK. Thank you, Chairman Lankford, Ranking Member McCaskill, Senator Peters and Senator Hassan. I would like to introduce my guest, my baby brother, Tim Akins, and his wife and my good friend, Debbie Akins, who have traveled here to support me.

Thank you for the opportunity to appear before you regarding my nomination to be a Member of the U.S. Merit Systems Protection Board. Thank you, in particular, for expediting this hearing in the interest of restoring the Board's quorum. I understand well the challenges facing the incoming Board, who must adjudicate a backlog that will soon be over 1,300. I am confident that if confirmed, with the assistance of the MSPB career and non-career staff, and the new Board members, we will be able to address the backlog as expeditiously as possible.

I am the daughter of career public servants who taught me, through their example, the essential role that career public servants play in the delivery of efficient, effective, and high-quality government services to the American people. I joined the Federal Government myself upon law school graduation, by accepting a position as an Honors Program Trial Attorney in the U.S. Department of Justice. Subsequently, I devoted my legal career to upholding the public's interest in maintaining a high-quality career civil service. For over 20 years, I represented civil servants' workplace interests as a private labor organization attorney.

I was privileged to represent National Aeronautics and Space Administration (NASA) scientists, engineers, and technicians, Naval Shipyard engineers and technicians, Army Corps of Engineers research scientists, Environmental Protection Agency scientists, Congressional Research Service experts, Government Accountability Office analysts, Administrative and Immigration Judges and many others.

I was privileged to rejoin the Federal Government in August 2009, as the General Counsel of the Federal Labor Relations Authority, where I was entrusted by the President and the Senate with enforcement of the labor-management relations provisions of the Civil Service Reform Act of 1978. And since January 2017, I have served as the Deputy General Counsel of the Office of Compliance, the Legislative Branch independent agency tasked with protecting Legislative Branch employees' workplace rights under the Congressional Accountability Act.

My experience as both a public servant and as a private attorney has prepared me for the important adjudicatory responsibilities Congress has conferred upon the MSPB Member, and I pledge my unqualified commitment to protect the Merit System Principles and to promote a Federal civil service free of Prohibited Personnel Practices. I further wholeheartedly embrace the MSPB's stated vision, that by fulfilling the agency's statutory mission, the MSPB will promote a highly qualified, diverse Federal workforce that is fairly

<sup>1</sup> The prepared statement of Ms. Clark appears in the Appendix on page 96.

and effectively managed, and provides the best possible government services to the American people.

In closing, I would like to thank the Committee staff, my fellow nominees, and acting MSPB Chairman Robbins for their professional and collegial approach to the preparations for this hearing. Further, I want to express my appreciation to my family, friends, and work colleagues over the years for their guidance and support. And most especially, I want to thank the thousands of Federal civil servants I have been privileged to meet over the course of my career. They are the foundation of my faith in the enduring value of the Federal civil service system to the American people.

Thank you for allowing me the opportunity to present these remarks, and I look forward to responding to any questions you may have.

Senator LANKFORD. Thank you, Ms. Clark. Mr. Maunz.

**TESTIMONY OF ANDREW F. MAUNZ,<sup>1</sup> NOMINATED TO BE A MEMBER, MERIT SYSTEMS PROTECTION BOARD**

Mr. MAUNZ. Thank you, Senator. Quickly I will introduce my family that is here today. My wife, Kira, our two daughters, Emory and Margot. My parents came in from Cincinnati, Ohio, Ed and Marie Maunz.

Chairman Lankford, Ranking Member McCaskill, Senator Peters, Senator Hassan, and the rest of the Members of the Committee and its staff, I would like to thank you for having me here today. I would also like to thank President Trump for nominating me to this position. To my wife Kira, our two daughters, my parents, and the rest of my family, I would like to thank you for your love and support during this process. I would also like to acknowledge the friends, co-workers, and former colleagues who have sent well wishes and congratulations. Last but not least, I would like to thank acting Chairman of the MSPB, Mark Robbins, and his staff for their tremendous assistance in preparing for this hearing.

First, I would like to tell the Committee a little about myself. I was born in a place called Clarksburg, West Virginia, where my father owned a small men's clothing store that was originally opened by my great-grandfather, an Italian immigrant. A few years after I was born, my dad closed up the store and my family moved out of town. We eventually settled in Cincinnati, Ohio, where my dad continued to work in retail and my mom worked as a teacher, primarily at a Catholic elementary school.

My father is the hardest working person I know. He would regularly work 70–80 hours a week, 6–7 days a week, to provide for our family. With his work schedule, my mom had to do the bulk of managing our household, which she did wonderfully while balancing her own career.

As an attorney working for the Social Security Administration and as a Federal employee, I have always tried to keep in mind that my salary is paid by the taxes of people like my parents, people who go to work every day, work hard, and expect their government to be responsive and efficient. These people, the American people, deserve a Federal Government with the best workforce pos-

<sup>1</sup> The prepared statement of Mr. Maunz appears in the Appendix on page 151.

sible. I believe that the MSPB plays a crucial role in achieving this goal. The MSPB helps ensure that all personnel decisions are based on merit, it helps protect whistleblowers and our veterans, it keeps the workforce free of partisan political activity, and so much more.

In my opinion, the MSPB fulfills its mission best when it applies the relevant legal authorities as they are written and does not stray beyond its statutory mandates. The job of the MSPB is not to favor one side versus the other. It is to protect our civil service system by reviewing the facts and applying the law in a neutral and fair way. When it performs its functions properly, the MSPB is one of the most important entities in achieving a Federal Government that works best for the American people.

I am ready for the important job of serving on the MSPB. For nearly 10 years, I have been immersed in the many complicated issues Federal agencies face. I have litigated employment law cases in many forums, including before the MSPB. I have provided legal advice on a wide variety of issues, and trained agency managers on some of the many laws they must be aware of when managing employees. I believe this experience will serve me well, if I am confirmed to the MSPB.

I am excited about this opportunity, and if the Senate confirms me, it would be an honor to serve in such an important position in our government. I will now make myself available to answer any questions the Committee may have. Thank you.

Senator LANKFORD. Thank you, Mr. Maunz. Ms. McLean.

**TESTIMONY OF CARMEN G. MCLEAN,<sup>1</sup> NOMINATED TO BE AN ASSOCIATE JUDGE, SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**

Ms. MCLEAN. Thank you, Mr. Chairman, Senator Peters, Senator McCaskill, and Senator Hassan. I am deeply grateful for the opportunity to appear before you as you consider my nomination to be an Associate Judge of the Superior Court of the District of Columbia. It is a great honor to be nominated and considered for this position.

I would like to thank the Judicial Nomination Commission and its chair, the Honorable Emmet Sullivan, for recommending me, and the President for nominating me. I thank Superior Court Chief Judge Robert Morin for attending here today, and Congresswoman Norton for her support. Finally, I would like to express my sincere thanks and appreciation to the Committee Members and the dedicated Committee staff for their hard work in considering my nomination, and for the courtesy and professionalism to me throughout this process.

Here with me today is my husband, Carson McLean, to whom I am immeasurably grateful for his unwavering encouragement, and my children, 8-year-old Coen and 5-year-old Cait, who inspired me to reach for my dream to become a judge. I love you all dearly.

I would also like to recognize my mother, Marcia Rush, also here today; my sister, Darcy Guerricagotia, who is on duty as a Lieutenant Commander in the United States Navy today; and other members of my family who have been endlessly supportive and are

<sup>1</sup> The prepared statement of Ms. McLean appears in the Appendix on page 210.

watching from afar. Finally, I would like to acknowledge the many friends and colleagues who have guided and encouraged me in a myriad of ways. Thank you all for your kind support.

In 1998, I moved from rural Oregon to the District of Columbia to attend Georgetown University Law Center and I have been here ever since. In 2001, I began working just a few blocks from here, at the Washington office of Jones Day, an international law firm. During my nearly 17 years at Jones Day, I have been privileged to work with many brilliant, strategic, hard-working lawyers, represent influential and innovative clients in a variety of industries, including digital music, automotive, and pharmacology. I have worked on large-scale litigation matters involving complex and novel legal issues. I am extremely grateful for the lessons that I have learned through these experiences and from my talented colleagues, and for the honor of working at Jones Day.

During the past 17 years, I have also dedicated a great deal of time to pro bono and public service matters impacting the citizens of the District of Columbia. While I have worked on a range of matters, I have spent the vast majority of my time in the service of at-risk children who need safe, permanent, and loving homes. Through these matters, I saw first-hand the impact of our justice system on the citizens of the district and was motivated to further my public service.

Through this work, I also frequently appeared before District of Columbia Superior Court judges who demonstrated a mastery of the relevant laws, rules, and procedures; who treated all litigants fairly, with dignity and respect; maintained high standards for counsel; were deliberate in their application of the law to the facts; and provided thoughtful and timely decisions. If I am fortunate enough to be confirmed, that is exactly the type of judge that I will work very hard to become.

Again, thank you for the opportunity to appear here today. I am humbled to be considered for this position, and I look forward to answering your questions.

Senator LANKFORD. Thank you. Thank you to all of you.

We have three mandatory questions that we ask all of our nominees, that I wanted to be able to just ask each of you, and I will ask each of you for a verbal response, and then I am going to go directly to Senator Hassan for questions from there.

First question. Is there anything that you are aware of in your background that might present a conflict of interest with the duties of the office to which you have been nominated? Mr. Kirk.

Mr. KIRK. No.

Senator LANKFORD. Ms. Clark.

Ms. CLARK. No.

Senator LANKFORD. Mr. Maunz.

Mr. MAUNZ. No, Senator. There is no fundamental conflicts, as I mentioned in the questionnaires. There could be, it is unlikely but there could be individual cases that I could have to recuse myself.

Senator LANKFORD. We will talk about that in a moment then. Ms. McLean.

Ms. MCLEAN. No.

Senator LANKFORD. The second one. Do you know of anything personal or otherwise that would in any way prevent you from fully

and honorably discharging the responsibilities of the office to which you have been nominated? Mr. Kirk.

Mr. KIRK. No.

Senator LANKFORD. Ms. Clark.

Ms. CLARK. No.

Senator LANKFORD. Mr. Maunz.

Mr. MAUNZ. No.

Senator LANKFORD. Ms. McLean.

Ms. MCLEAN. No.

Senator LANKFORD. Third question. Do you agree, without reservation, to comply with any request or summons to appear and testify before a duly constituted committee of Congress if you are confirmed? Mr. Kirk.

Mr. KIRK. Yes.

Senator LANKFORD. Ms. Clark.

Ms. CLARK. Yes.

Senator LANKFORD. Mr. Maunz.

Mr. MAUNZ. Yes.

Senator LANKFORD. Ms. McLean.

Ms. MCLEAN. Yes.

Senator LANKFORD. Thank you. Thank you all. I recognize Senator Hassan for her questions.

#### **OPENING STATEMENT OF SENATOR HASSAN**

Senator HASSAN. Well, thank you, Mr. Chairman, and Ranking Member, and thank you to all of our nominees, and congratulations on your nominations and to your families as well. Nobody does public service on their own. They do it with the support of their families, and we are very grateful to yours, as well as to all of you.

Ms. McLean, I wanted to just start with you. It is always important to me, also a lawyer, to find out why people who aspire to a judicial position became lawyers in the first place. So what inspired you to want to go into law and what guiding principles will you take to the Superior Court, should you be confirmed?

Ms. MCLEAN. Thank you, Senator, for that question. When I was a child, my mother was a legal secretary and a judicial assistant, and I went to work with her on many occasions and I saw what the men that she worked for did for a living, how they helped their clients, how they helped the litigants before them. I decided when I was 5 that I was going to be a lawyer, and I never wavered.

I did not voice my desire to be a judge until I started this process, but it was always there. I always wanted to serve my community in some capacity, and that is why, for the past 17 years, I have been so dedicated, while in private practice, to pro bono service, and why I now want to make the move to full-time public service.

And the quality that I would take to the bench is just an inherent sense of justice, principles, and a desire to be organized and prepared, and treat each litigant with dignity and respect, and move cases forward in a timely manner so that all can have access to justice.

Senator HASSAN. Well, thank you. What I am always looking for in a nominee, and in a judge, is somebody who turns their courtroom into a place where everybody truly not only is treated procedurally equally but feels equal in the moment and understands

that their case will be heard, based on the law and based on the general principles that we respect each and every individual. So thank you very much for your answer and for your willingness to serve.

To the MSPB nominees, I am going to ask each of you to answer just the same question. The MSPB has the authority to issue stays of agency action in whistleblower cases. However, they cannot do so when the MSPB lacks a quorum, which, as you have all noted, is currently the case.

The Committee Chair and Ranking Member have co-sponsored legislation to allow for the MSPB to issue additional stays in the absence of a quorum, which would be a good step, but in an ideal world we would always have a quorum.

I worry that this lack of urgency to have a quorum has already had negative impacts on whistleblowers and sends a message to potential whistleblowers that their protection is not a priority.

So should each of you be confirmed, how will you work to ensure that whistleblowers are given adequate protections, and will you advocate for changes that will ensure that they always have protections, even in the absence of a quorum?

And I will start with you, Mr. Kirk.

Mr. KIRK. Thank you for the question, Senator Hassan. Whistleblowers constitute one of the lights in our government where, when it turns on, you know there is something to be done now, kind of like the lights when the British were coming, and they deserve our full attention, protection. Those things they are bringing to us are urgent matters. We need to take full cognizance of them. We need to do something about them. I find that one of the best things that MSPB does is adjudicate those issues that typically are brought up from the Office of Special Counsel to us, and the fact that they cannot get justice right now, it is, like I said, the elephant in the room.

Senator HASSAN. Thank you. Ms. Clark.

Ms. CLARK. The principle step that we will be taking, that I will be taking, if confirmed, is to adjudicate those cases fairly, impartially, and expeditiously. I am sure that if we are confirmed one of the first things we will do is be meeting with staff to come up with an action plan for clearing the backlog and prioritizing cases. It would not surprise me at all if a big subject of discussion is whether to make whistleblower cases one of those priorities, and how to do that. But, principally, what we can do for whistleblowers is adjudicate those cases fairly and expeditiously.

With regard to change, I believe that I really need to be there and understand the landscape, but consideration of policy recommendations or procedural changes to the MSPB that would even more protect whistleblowers is something that I will dedicate myself to.

Senator HASSAN. Thank you. And Mr. Maunz.

Mr. MAUNZ. Thank you, Senator. To echo my fellow nominees, I believe whistleblowers play a very important function in our Federal Government in identifying malfeasance. And to the extent someone has made a disclosure that is protected under the whistleblower statutes, they should be protected from retaliation to the fullest extent of the law, and I believe the best way for the MSPB

to make sure whistleblowers are protected is to apply that law and to take those cases very seriously that come before us.

As far as your question about changes, I think that is something that once I get into the job, hopefully, if confirmed, that I would be able to talk to career staff and other people that may have identified issues that have popped up now, when there was not a quorum, that could be fixed, and things that could be changed in the legislation to help prevent those problems from happening again, should a lack of a quorum occur.

Senator HASSAN. Well, thank you very much, and thank you, Mr. Chair. I yield the rest of my time.

Senator LANKFORD. Thank you. Senator Heitkamp.

#### **OPENING STATEMENT OF SENATOR HEITKAMP**

Senator HEITKAMP. Thank you, Mr. Chairman, and thank all of you for your willingness to serve and the willingness to put your name forward. This is kind of a grueling process. I know a number of you have been waiting a long period of time, maybe through two Administrations, in terms of nominating. But it is time that we get the Board up and running and that we make sure that we have enough judicial support in D.C. to support the important work that that branch of government does. So congratulations to all of you.

I am struck by kind of this sense that the merit system is antiquated, and I am curious about the role that each one of you will play, going forward, in protecting that system, or at least hopefully modernizing that system. And so maybe talking about merit-based employment, start with you, Mr. Kirk, can you give me the elevator speech that you would give anyone who told you that Federal employees do not do a good job and that their job is unreasonably protected, and that we really do not need a merit-based system anymore?

Mr. KIRK. I come from a military background in the Army and I can tell you that we value our fire protectors, our police, our military. But the people do not understand. What gets delivered to them every day is from a Federal employee. That Federal employee goes to work, work his or her heart out, goes home to the family. Every day they have a tough job. They go and do what we have to have done, and we cannot just say there is no merit to their business. They are our business.

So the merit system, in my viewpoint, would be to celebrate their service, to give them the due they are due, and as I said earlier, to pay them fairly for the fair day's work they put in.

Senator HEITKAMP. Thank you. Ms. Clark?

Ms. CLARK. Sure. It always strikes me as inconsistent to question why we should have a merit-based system when merit is such a positive word. But the essential point of our merit-based system is, in the first instance, to protect against arbitrary action, decisions based on partisan or other prohibited discrimination and reasons, to create a stable workforce, an educated workforce, and to ensure that decisions made about their employment is always based on merit. And at the end of the day, that means that you are going to have the most highly qualified, highly trained, career staff who can weather the changes in government that are the foundation of our democracy. And what makes those changes allow for continuity



of those outstanding government services is a merit-based civil service.

Senator HEITKAMP. Thank you. Mr. Maunz.

Mr. MAUNZ. Thank you, Senator. Senator, I would tell this individual that the Federal Government and the Federal workforce work for all of us, and we do not want it to work for a particular political party, regardless of what party you belong to, or no party at all. You want the jobs to be—who gets the job to be determined on who is the best person for the job. You do not want it to be handed out through political patronage or anything like that, and I believe our civil service laws, our Merit Systems Principles, play an important role in ensuring that the best people are hired for the jobs and that those people are not fired for the wrong reasons.

Senator HEITKAMP. Do you think if we did not have a merit-based system and the protections of a merit-based system we would be able to recruit the same quality Federal employees that we have today? And we will start with you, Mr. Maunz.

Mr. MAUNZ. Well, I think as far as who would be attracted to the jobs, I am not sure, but, without certain civil service laws the same people would not apply. But I certainly think it helps ensure that the actual people who are hired are the best people for the jobs, and that, as I just mentioned, any time, in a government agency, depending, there could be the motivation to hire people that are politically connected or people that maybe volunteered on the campaign, or something like that. And I do not think we want that, and I know we do not want that.

So I think the civil service law certainly helps us hire the best people.

Senator HEITKAMP. Ms. Clark.

Ms. CLARK. I agree. I think the system does ensure that those people who are hired are highly qualified and properly vetted, and that the checks that are in place in terms of performance management allow for that decision to be evaluated and corrected if made incorrectly in the first instance.

Senator HEITKAMP. Mr. Kirk.

Mr. KIRK. Senator, history informs us. We learn from the past. Chaos happens without a merit systems protection service. We are looking for the brightest, the best, the stars to come into the government. They serve because they want to serve. They do not come here for the salary. There is not much of that. They come here because they want to be somebody, doing something for the American public. Those are the people we want. I would never want to see the merit system go away. Those nine principles are sacrosanct.

Senator HEITKAMP. Yes. I mean, I think quality, continuity, and making sure that partisanship is OK, at top levels, as they fulfill an agenda, but the daily, day-to-day work, want to draw from the most expansive pool that you can, and that means that it cannot be partisan-based.

And, Ms. McLean, congratulations on getting your hearing and good luck to you. I know you will be a great judge. Thank you.

Senator LANKFORD. Senator Peters.

Senator PETERS. Thank you, Mr. Chairman. Mr. Kirk, the first question is for you. After more than a year without a Board quorum, what is your plan to adjudicate the more than 1,250 cases

currently awaiting a decision from the Merit Systems Protection Board?

Mr. KIRK. Thank you, Senator Peters. Right now we have a staff that is working on those cases and they have brought them forward in certain versions. Those cases have to be looked at by us in a circular manner right now. Under our authority, I, as the lead of the agency, have the authority to reach out to other agencies and pull in Administrative Law Judges (ALJs), administrative judges and attorneys and staff, and bulk up our processing. They will still come before the three of us, if confirmed. To do that, I will consult with my colleagues, in a collegial manner, but in management I will also start talking with the staff of the Board and find out what ideas they have.

I have been included in processing of prior problems. At the Army Science Board, they were years behind. I came with a Lean Six Sigma team, three people, and in 45 days we converted that process, reformatted it, and rolled it out, deployed a system that now, maximum is 90 days. We bring in people to come serve because of that. But you have to think outside the box. The old ways of doing things will not cut it, and we have a huge problem coming up.

As you are probably aware, there may be some changes coming in the Federal Government. If that happens, there may be Reduction in Force (RIFs), furloughs, firings. We have to deal with that, and the way to deal with that is to fairly and quickly get a system into place to deal with it. I believe I can do that. Thank you, Senator.

Senator PETERS. Well, if confirmed, would you institute specific changes in policies? You mentioned one from your previous experience. Would we expect something similar to that, or do you have something else in mind?

Mr. KIRK. Well, I have not really studied it yet and I would have to deal with my colleagues and the Board staff, so specifics, no, I am not going to prejudge anything because I do not know what I am going to find when I find the lay of the land. The acting Chairman and present staff have given me a light briefing at the top about things. I think they have some good handles on some things, but they have not been able to make that move because they do not have a quorum and they cannot vote those things through.

As administrator and chief executive officer (CEO), I will have certain powers, but I will not execute them without the collegial support of my Board and staff. Thank you.

Senator PETERS. So what is your understanding of how this backlog occurred in the first place?

Mr. KIRK. Well, they can handle about 75 cases, I believe, a month. When they had a few cases kind of bulk up on them, on the calendar, all of a sudden the Vice Chairman left, and then the Chairman left, and then there was no action. And you have to give the man credit. Mark Robbins did yeoman service but he cannot vote. And so without that it just piles up.

Senator PETERS. Thank you.

I am going to want to ask the three of you some of your thoughts on proposed legislation, the Modern Employment Reform Improvement and Transformation (MERIT) Act which would significantly

reduce the time it takes to fire a Federal worker accused of poor performance or misconduct. The bill reduces the time for an employee to appeal firing decisions or for the MSPB to intervene on their behalf, and extends new employee probationary periods to 2 years. It would also allow agencies to avoid negotiated grievance procedures, reduce benefits of workers who are convicted of a felony and fired, and rescind bonuses or other cash awards deemed to be wrongly paid.

On Tuesday of this week, the Nation's largest Federal union, the American Federation of Government Employees, American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), signaled its strong opposition to the MERIT Act, arguing that the legislation would make it easier to fire Federal employees and would give agencies alternative mechanisms for punishment of Federal workers.

So to each of the nominees, my question is, in your view, does this legislation support or undermine the due process system that provides Federal workers with a meaningful opportunity to defend themselves when treated unfairly? And I guess we heard from you first, Mr. Kirk, so we will start at the other end of the table and work that way. Mr. Maunz.

Mr. MAUNZ. Thank you, Senator. I would need to study the legislation more. I know I saw news reports about it passing a House committee, I think, earlier this week. I would need to take a closer look at all the ins and outs of the particular legislation. I think, generally, the MSPB should stay out of the legislation that Congress is proposing in this area. Our job is to take whatever laws Congress gives us and apply those to the facts of individual cases. I leave the making of laws to lawmakers. So, Senator, I would certainly need to study this legislation more before I could give any type of informed opinion on it.

Senator PETERS. OK. And we will give you that opportunity and we will be following up with some written questions after you have had a chance to review the legislation. We look forward to having your response.

Ms. Clark.

Ms. CLARK. Yes, Senator Peters. Similarly, I have seen the press reports. I have not studied the legislation carefully enough to have a professional opinion. I would also note that the statutory role of the MSPB is not to make policy but to adjudicate cases based on policies set by Congress, and then to offer evidence-based studies and review of OPM personnel actions. I really look forward to that part of the job. I know that, as a practicing attorney, I frequently consulted MSPB's evidence-based studies and found them to be very useful in this area.

I also would note just that I had a significant period of time as a Federal manager and found the existing merit system to be one that I found to be very practical and workable in terms of holding employees, who were my subordinates, accountable, and without undue use of resources or undue time. And I also found, in my experience, that the due process protections not only benefited me as a manager, to make sure that we were really doing the right thing, we had our facts straight, but also supported the collegial atmosphere of the other workers who were not involved in the perform-

ance or misconduct type issues, because not only did they see us as holding their coworker accountable but they also saw us acting in a way that was fair and transparent, giving them the assurance that if they were ever in those shoes they would be treated according to the Merit Systems Principles as they exist.

Senator PETERS. Thank you. Mr. Kirk.

Mr. KIRK. Senator, I do not want to prejudge this because I have not read the legislation. I have been here 40 years in this town, though, and sometimes what gets introduced and passed does not get enacted. So I would be very curious to see what is enacted. But we follow the laws you give us, and we follow the Constitution, and the court, once in a while, takes some of the laws you pass and sends it back.

So I do not know which it will be. I will try to do my very best, under the laws you give me, and I guarantee you, and I pledge to you we will be up here, dealing and answering with your questions any time you want us here.

Senator PETERS. So, and I understand, either one of you or all three of you, have mentioned you have not seen the legislation so I could indulge the Chairman, that is kind of just a general question and does not require you looking at the legislation specifically and knowing the details.

Just in your view, generally, and just your thoughts, quickly, would eliminating or shortening processes for Federal workers to challenge firing decisions of agencies and empowering agencies to take back bonuses or garnish benefits, do you think that improves Federal employment practices?

We can start with you, Ms. Clark, and then we will go to Mr. Maunz and then to Mr. Kirk.

Ms. CLARK. Again, I just have to say that the array of tools available to managers to hold employees accountable is a policy decision. It is not the function of the MSPB to make those policy choices. It is the role of Congress. And to the extent—

Senator PETERS. I am asking you, just your thoughts, generally. I am not asking you to make policy. I just want to know where you are coming from on this issue. How do you think about it?

Ms. CLARK. Well, I can say that from my experience as a Federal manager for 7 years with a staff of about 70, that I found the tools at my disposal in the civil service to be adequate and practical, and I was able to hold employees accountable for a range of performance and conduct issues without an issue, and continue to motivate the staff that was under me.

Senator PETERS. Mr. Kirk.

Mr. KIRK. The rights and privileges of individuals, when they begin to serve in our government, are the same rights and privileges as anybody in life, but when they assume certain duties they assume certain obligations. With rights and privileges comes duties and obligations. I would expect people to perform their job. If there is some tweaking needed to be done to the system, I trust you and the other Senators and the House to tell me what you want done, because you will have judged those issues, and I will enforce your laws. But we do not make policy at the MSPB.

Mr. MAUNZ. Thank you, Senator. Senator, I think as far as due process and things like that I think the Supreme Court has stated

that public employees have the due process that the legislature gives them. So, once again, it is up to you all and your colleagues to determine the steps that need to be taken to remove Federal employees.

As far as the specific proposals you have given, once again I am not trying to dodge it, but you asked my opinion. I think it would depend on the circumstances. I do not know of any specific examples off the top of my head where a shorter timeframe would have allowed an agency to hold an employee accountable where they could not otherwise, but I do not know of all the situations that the legislators that put together that particular piece of legislation have examined or studied. So I do not know the full range of the issues.

Senator PETERS. Thank you. Thank you, Mr. Chairman, for the additional time.

Senator LANKFORD. Ms. McLean, you decided to be a lawyer at 5 years old, so I feel like I should swap out and put Cait in that chair and then go ahead and begin now, questioning her and preparing her for her future nomination, is what I feel like we should do, to go ahead and get that started. Because is not Cait five?

Ms. MCLEAN. Yes, Senator.

Senator LANKFORD. So maybe the next hearing, Cait, we will bring you up and get you started in this process.

Let me ask you a couple of other questions on this. The role of a judge is a very important role, obviously, in our democracy, but it is to focus on the facts and the law. So my simple question for you, do you pledge to be able to judge based on facts and law, not based on preference?

Ms. MCLEAN. Absolutely, Senator. That is the essential role of a judge and I take that responsibility very seriously.

Senator LANKFORD. Thank you for that.

Let me ask you about your pro bono experience, which you have done extensive work on that. How do you think that affects you as you approach this, coming at it not from preferences or background but coming at it with facts and law? The pro bono experience obviously affects your own family, your own background, what you have seen, how you practiced law in the past. What do you bring to this that is an asset?

Ms. MCLEAN. My pro bono experience rounds out my overall experience in the diversity of my background, from not only just representing large corporations but representing the individuals that I will see in Superior Court if I am fortunate enough to be confirmed, because all of my clients would have been pro se had I not been their pro bono lawyer, and as we know, Superior Court has a tremendous number of pro se litigants. And I have understood, over the years, what their background is.

I have learned how to communicate effectively about complicated legal issues and processes, and it has taught me, through representing combat veterans, a mother who wants to adopt a child who is in the neglect system and has acquired immune deficiency syndrome (AIDS), a father of four who is dealing with housing code violations, I have gained respect to all of the litigants that would come before me, and it will help me to ensure that I continue to treat everybody with respect so that everybody gets to have their

fair day in court. And then I can communicate with them about the results of my decision in a means that they can understand.

Senator LANKFORD. OK. Fair enough. As we go back through a lot of things you have written, that is the benefit of where you have been in the past. You have a lot of writing and a lot of things there. There is one that stood out to me. You had written a journal entry called "Innovation Does Not Cure Constitutional Violation: Charitable Choice and the Establishment Clause," where you kind of laid out some perspective on that. Walk me through a little bit of that particular journal, if you remember it, from there, because it has been a while since you have written that, obviously, but just on your perspective that came from that, where that came from, what your perspective is on the establishment clause and charitable choice.

Ms. MCLEAN. Yes, Senator Lankford. Thanks for that question. I wrote that note about 20 years ago—

Senator LANKFORD. OK. So it is recent.

Ms. MCLEAN [continuing]. When I was in law school. I had just graduated from a conservative Christian university and was attending Georgetown, and I was taking religion and law courses and trying to sort of see the intersection of my faith in the extent of time that I had spent there with the religion clauses. And I have not reviewed that note in the past 20 years, but if I recall correctly it was just noting that the free exercise of religion, as guaranteed by the Constitution, is one of our core values.

Senator LANKFORD. That is great. Thank you. Sorry to pull up a two-decade-old law journal.

So let me ask a couple of other questions of some of the folks here for MSPB. The issue that Senator Peters brought up I think is the dominant issue, and, Mr. Kirk, you brought this up already. The backlog is untenable for the Federal worker at this point, and it has to be resolved, but it has to be resolved fairly.

So you talked a little bit about the process with Senator Peters. What I need to hear from you is this group is not going to feel the obligation to hurry and to not give a full hearing to the cases that are coming before them, that you are going to feel the pressure of needing to get caught up on the backlog, but that individual that has been waiting a long time is feeling the pressure of waiting that long to get a good decision on it, that is fair one way or the other.

Help me understand how you are going to get the backlog but also maintain the fairness of the process.

Mr. KIRK. Thank you, Senator Lankford. When you adjudicate a case, you have to give every case full, unbiased, nondiscriminatory analysis. You do your research, you check out what is important in that case, you check out the precedents, the constitutional law. Some cases will have neither law nor facts on their side. Those are easy to dispose of. On the other hand you have cases that are magnificently complicated, covering years of problems. Those have to take a longer time, and a more thorough time. I would anticipate some of those cases I will be sending back to research again, to get those people the fairness and the justice they deserve.

These are not easy matters but every single person who comes before us, that is his life. That is her history. That is the worth of the individual, and they are going to get full, complete justice

under the laws of the Constitution and our precedents in court and the MSPB. And if you change the laws, we will enforce those laws, but they are still going to get a fair judicial outcome.

Senator LANKFORD. That is what we are looking for.

Ms. Clark, you have been around this quite a bit, to be able to see the functioning, to work with a lot of different clients and such. MSPB was established in 1978, as a part of the Civil Service Reform Act. There is a lot that has changed since 1978, thankfully, that has changed in that time period. Do you see things that need to change in MSPB that are just structural changes that need to be there, to be able to best protect workers?

Ms. CLARK. Thank you for the question. I really do believe that I need to be there and get an in-depth understanding of the work processes and the structural organization in order to accurately answer your question. I am sorry. I am really not trying to dodge, but that—

Senator LANKFORD. I understand that. That is fine.

Ms. CLARK [continuing]. Is also based on the experience I had at the FLRA that it was until I got there that I really could form a good judgment. But everything that we have been talking about, in terms of the continuity of the career civil service, I know first-hand how important that is, and we have that at the MSPB too. And I believe that we are going to be able to get up to speed and answer the kind of questions you have very quickly, if and when we are confirmed.

Senator LANKFORD. OK. Fair enough. Mr. Maunz, you had an interesting response to me when I was talking about conflicts of interest, that demands some more clarification. Is there an area that you know of right now that you are going to need recusal, or that there may be a pending conflict of interest?

Mr. MAUNZ. No, Senator. I think I was being extra cautious.

Senator LANKFORD. Your legal training.

Mr. MAUNZ. Like anyone who has practiced in an area of law that they would then be overseeing cases in the same area I have consulted with MSPB ethics staff. Potentially if there were cases I worked on personally or situations I worked on personally at Social Security Administration, I would not want to be in a role of judging that. Obviously, if they are someone that I knew personally or an individual that I knew on a personal level, I would not want to be involved in deciding their case either.

So that is something I would discuss on a case-by-case basis with the Ethics Council. I do not know of any specific cases before the MSPB that are like that. I do not know of any huge swaths of cases that I will have to recuse myself from. I think I was just, trying to—

Senator LANKFORD. Being lawyerly.

Mr. MAUNZ [continuing]. Prevent myself from saying no here and then maybe 2 years down the road I have to recuse myself from a case and then someone points to this testimony.

Senator LANKFORD. You are right. Thank you. Thank you for that.

Ms. Clark, you also mentioned, in your background materials, you have done extensive work as a counsel at International Federa-

tion of Professional and Technical Engineers. Do you anticipate having to recuse yourself from any of those cases?

Ms. CLARK. It is highly unlikely because it has been nearly 10 years since I worked there. However, I will work the General Counsel's Office and the Ethics Officer at the MSPB to ensure that if there are any cases that I need to recuse myself from, that I will do so.

Senator LANKFORD. Other issues that you would want to make sure you get into this testimony? We have obviously pummeled you with questions on the staff level. We have a tremendous amount of written materials from you. Are there things that you want to make sure that you get into the public testimony today, from any of the four of you? Mr. Kirk.

Mr. KIRK. I would just like to thank Acting Chairman Mark Robbins, Jim Eisenmann, Roz Coates, and all of the people at MSPB that briefed us and did a good job of being our Sherpas. I would like to thank those people who have been supportive of my candidacy, and particularly the President, who nominated me, and I am just grateful to be here, Senator.

Senator LANKFORD. OK. Thank you. Ms. Clark.

Ms. CLARK. I just appreciate you all, your support in expediting this hearing so that we can get a quorum at the Board and get back in business. Thank you.

Senator LANKFORD. Thank you. Mr. Maunz.

Mr. MAUNZ. Senator, I do not have anything specific other than to say if confirmed to this position it would be truly an honor to serve, and I think this is important work that needs to be done well.

Senator LANKFORD. I agree. Ms. McLean.

Ms. MCLEAN. Chairman, I have nothing to add other than that it is truly an honor, and if I am confirmed I will work very hard to neutrally apply the law to the facts.

Senator LANKFORD. Thank you.

The nominees have made financial disclosures and provided responses to biographical and prehearing questions submitted by the Committee.<sup>1</sup> Without objection, which I will assume there is no objection on the dais,<sup>2</sup> this information will be made part of the hearing record,<sup>3</sup> with the exception of the financial data, which is on file and available for public inspection in the Committee offices.<sup>4</sup>

The hearing record will remain open until noon tomorrow, Friday the 20th, for submission of statements and questions for the record. I would assume that the Committee will be in contact with Cait McLean to be able to discuss the next hearing for her as well. But thank you for bringing your families and thank you for already your commitment to be able to fill out so many pieces of paper. There is so much background work to be able to get to this spot. We look forward to getting a chance to be able to move this on to the next level in the days ahead.

With that, the hearing is adjourned.

[Whereupon, at 11:07 a.m., the Committee was adjourned.]

<sup>1</sup> The information submitted by Mr. Kirk appears in the Appendix on page 27.

<sup>2</sup> The information submitted by Ms. Clark appears in the Appendix on page 98.

<sup>3</sup> The information submitted by Mr. Maunz appears in the Appendix on page 153.

<sup>4</sup> The information submitted by Ms. McLean appears in the Appendix on page 211.



## APPENDIX



### Opening Statement

Hearing before the Homeland Security and  
Government Affairs Committee

Thursday, July 19<sup>th</sup> at 10:00 AM

**Nomination of Dennis D. Kirk to be Member and Chairman of the U.S. Merit Systems Protection Board;**

**Nomination of The Honorable Julia A. Clark to be Member of the U.S. Merit Systems Protection Board;**

**Nomination of Mr. Andrew F. Maunz to be Member and Vice Chairman of the U.S. Merit Systems Protection Board;**

**Nomination of Carmen G. McLean to be an Associate Judge, Superior Court of the District of Columbia**

Good morning. Today we will consider the nominations of Dennis Kirk, Julie Clark and Andrew Maunz to be Members of the Merit Systems Protection Board. We will also consider the nomination of Carmen McLean to be an Associate Judge of the Superior Court of the District of Columbia.

The Committee takes these nominations very seriously, and we are pleased to have you appearing before us today.

Dennis Dean Kirk, originally of Kansas, earned a B.S. from Northern Arizona University and his J.D. from the Washburn University School of Law.

Upon graduation, he moved to the Washington area and began working for the Interstate Commerce Commission.

Mr. Kirk left government service to practice law in private practice in Northern Virginia for almost three decades before rejoining the federal government in 2005.

From 2005 until 2012, Mr. Kirk worked at the Pentagon for the Department of the Army, where he was recognized with multiple awards including a Special Act or Service Award for saving the Army millions of dollars.

The Honorable Julia Akins Clark is originally from the Shawnee, Oklahoma area. She graduated from Oklahoma Baptist University with a B.A. in Political Science and then proceeded on to American University's Washington College of Law, where she earned her J.D. in 1980.

After completing law school, Ms. Clark also went to work for the federal government, joining the U.S. Department of Justice. After five years of public service, she went into private law practice here in the area before moving on to work briefly for the National Coalition for the Homeless.

Ms. Clark worked as Counsel for the International Federation of Professional and Technical Engineers for over two decades before being nominated and confirmed twice during the Obama Administration to serve as the General

Counsel of the Federal Labor Relations Authority. Ms. Clark currently serves in the Congressional Office of Compliance.

Andrew Felton Maunz, of Maryland, is also nominated to serve as a Member of the MSPB. A native of Cincinnati, Ohio, Mr. Maunz received his B.S. from Miami University in Ohio in 2005 and then attended the University of Toledo College of Law, earning his J.D. in 2008.

Like his fellow MSPB nominees, Mr. Maunz joined the federal government upon completion of law school. Mr. Maunz has worked as an attorney in the Office of the General Counsel of the Social Security Administration since 2008. He currently serves the agency as a senior attorney and has represented the agency in employment litigation before administrative agencies, including the Merit Systems Protection Board.

And Carmen McLean is appearing before us today as a nominee to be an Associate Judge of the Superior Court of the District of Columbia. Ms. McLean, originally from Oregon, graduated with a B.S. from George Fox University in 1998 and earned her J.D. from Georgetown University Law Center in 2001.

Ms. McLean is a Partner at Jones Day here in Washington, DC. She has extensive experience in contracts, tort and antitrust law. She's also developed an expertise in civil procedure and discovery, especially discovery practices relating to new technologies and social media.

I would be remiss if I didn't mention Ms. McLean's tremendous work on behalf of at-risk children in Washington, DC. Ms. McLean has been active with the Children's Law Center and has provided thousands of hours of pro bono work to help individuals and families who want to provide a safe and permanent home for at-risk children. For this work, Ms. McLean was named in 2012 Pro Bono Lawyer of the Year by the D.C. Bar Association. I applaud your hard work and commitment to your community.

Committee staff reached out to a variety of these nominees' colleagues and affiliates, who spoke highly of them.

Committee staff also had the opportunity to interview all the nominees on an array of issues.

They have thoughtfully and competently answered each question.

I look forward to speaking with you a bit more today on your experience and accomplishments and how you intend to bring them to bear in a fair and impartial manner for the Merit Systems Protection Board and for the District of Columbia.

I now recognize Ranking Member Peters for his opening statement.

**U.S. Senate Homeland Security and Governmental Affairs Committee**

**Nomination of Dennis Kirk to be Chairman, MSPB,**

**Hon. Julia Clark to be a Member, MSPB**

**Andrew Maunz to be a Member, MSPB**

**Carmen McLean to be an Associate Judge, DC Superior Court**

**July 19, 2017**

**Senator Gary C. Peters, Acting as Ranking Member**

***Opening Statement***

Thank you, Mr. Chairman, and thank you to the nominees for being here today and for your willingness to serve.

Ms. McClean, you have the rare distinction of being nominated to the bench by President Obama and President Trump. I'd love to hear more about how you managed that. It's a great relief to have a judicial nomination without rancor or controversy. I hope you won't feel left out if you don't face too many questions at this hearing.

Today we are also considering three candidates for appointment to the Merit Systems Protection Board (MSPB), which, as its name suggests, has the core function of safeguarding a merit-based system of governance.

In a merit-based system, jobs to civil servants are not handed out based on political backgrounds or financial contributions. Instead, employees must be hired and retained based on their skills and effectiveness in carrying out the many federal services our communities rely on.

Whether it's securing our borders, assisting our veterans, or protecting our environment, we need to ensure the federal government is pulling from a wide and diverse talent pool of Americans who are dedicated to working hard for the public.

This is a long-term strategy. Presidents, their Cabinets, and legislators will come and go. A stable civil service is essential for maintaining a level of consistency, reliability, and competence in the American government, regardless of political winds.

The Merit Systems Protection Board was established in the same legislation that codified a framework for a merit-based workforce. The Merit System Principles and Prohibited Personnel Practices laid out in the Civil Service Reform Act provide us with the necessary ingredients for preventing our civil service from becoming a system of political patronage.

The principles include commonsense worker protections like equal opportunity, retention based on job performance, and fair pay. They rightfully prohibit employees from taking personnel actions based on anything other than an individual's qualifications, performance, and suitability for public service. Importantly, they also prohibit retaliation against whistleblowers who lawfully disclose instances of waste, fraud, and abuse.

With over 2 million employees, the federal government is a large, often cumbersome entity. But the merit system principles set a critical foundation for accountability. While protecting this framework, we should also diligently try to identify opportunities to make the workforce more efficient.

The MSPB can play a role in this. The Board is tasked with upholding the merit system principles through the precedent it sets in adjudicating cases and by taking proactive steps through civil service studies and reviews of OPM rules.

As we consider your nominations, the question of how you will reinforce the merit system and promote an effective federal workforce is central to this conversation, especially given the unfair—and frankly harmful—sensationalized attacks on our civil service.

We should approach these issues mindful that we have been entrusted as stewards of taxpayer dollars and that we should work together so that government works for everyone. Thank you, and I look forward to your testimony.

MSPB NOMINATION HEARING TESTIMONY

DENNIS DEAN KIRK

MEMBER AND CHAIRMAN

U.S. MERIT SYSTEMS PROTECTION BOARD

SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS

July 19, 2018

Chairman Lankford, Ranking Member Heitkamp and Members of the Committee:

Thank you for this opportunity to appear before you on my hearing for confirmation to serve as a Member and the Chairman of the Merit Systems Protection Board (MSPB). I'd like to introduce my family: my son, Dean (now in his final year in law school at my alma mater, Washburn University of Topeka, Kansas), and my brother, Colonel Donald R. Kirk, U.S. Army (Ret.), who spent over 32 years in service to our country. My Intern, Oriet Hemenway, is here observing how our government works.

My thanks to the Honorable Tom Davis, my friend of over three decades, for his supporting statement he submitted to the Committee, and ask its admission into the record. Tom appointed me to the Fairfax County (VA) Consumer Protection Commission, where I am now on my 36<sup>th</sup> year of service.

The MSPB protects 2.2 million federal employees by conducting fair and neutral case adjudications, regulatory reviews, and independent government studies to improve the workforce. MSPB, in conjunction with the Office of Personnel Management and Office of Special Counsel, protects merit system principles and prevents Prohibited Personnel Practices. The Constitution, U.S. Code, Code of Federal Regulations, and precedents in Courts and the MSPB, all guide the Board in reaching decisions on original, appellate, and specialized jurisdiction areas.

MSPB has a backlog of about 1,250 cases awaiting decision because no voting board quorum exists. If nominees are confirmed, it initiates the process towards delivering fair and equitable justice to waiting federal employees. Employees reporting violations of law, rules and regulations, waste, fraud, abuse, mismanagement, and specific substantial dangers to public safety will receive the Board's full help, such as protecting whistleblowers against retaliation and retribution.

If confirmed, in collegial collaboration with my other Board members and MSPB staff advisors, I pledge to ensure the Board will deliver government-wide studies to advise and protect the merit system by analyzing the health of the workforce, offer best practices, seek modernization of the

workforce, enforce fair treatment and safety for whistleblowers, and insure a workplace free from Prohibited Personnel Practices.

As a proven strategic innovator, if confirmed I will develop creative, rapidly effective solutions to complex problems. For example, I will recruit, hire, train, educate, and deploy into public service at MSPB the very best qualified diverse pool of federal workers. This will assure fair pay with excellent treatment for all employees, so they can exhibit the highest standards of integrity while conducting public service.

The Secretary of the Army created a new position in Army OGC. I was its first Associate General Counsel for Strategic Innovation and Business Transformation. My responsibilities were to create, design and lead major business modernization. I developed efficient, economical improvements in civilian/military operational and personnel systems. This saved millions of dollars for taxpayers. Such incredibly difficult challenges could not have been accomplished without the support of our Army team of excellent public servants.

It is a great honor and privilege to again hear the call to serve the United States especially in such a challenging and noble function. I am happy to take any questions, and answer within my best abilities and present level of knowledge about the MSPB.

ORIGINAL  
SIGNED

3/28/18  
version  
sent MSPD

**REDACTED**

## HSGAC BIOGRAPHICAL QUESTIONS FOR EXECUTIVE NOMINEES

### 1. Basic Biographical Information

Please provide the following information.

<i>Position to Which You Have Been Nominated</i>	
<u>Name of Position</u>	<u>Date of Nomination</u>
Member (Chairman), Merit Systems Protection Board	3/12/18

<i>Current Legal Name</i>			
<u>First Name</u>	<u>Middle Name</u>	<u>Last Name</u>	<u>Suffix</u>
Dennis	Dean	Kirk	

<i>Addresses</i>					
<u>Residential Address</u> (do not include street address)			<u>Office Address</u> (include street address)		
			Street: 6315 Anneliese Drive		
City: Falls Church	State: VA	Zip: 22044	City: Falls Church	State: VA	Zip: 22044

<i>Other Names Used</i>						
<u>First Name</u>	<u>Middle Name</u>	<u>Last Name</u>	<u>Suffix</u>	<u>Check if  Maiden Name</u>	<u>Name Used From</u> (Month/Year) (Check box if estimate)	<u>Name Used To</u> (Month/Year) (Check box if estimate)
None					Est <input type="checkbox"/>	Est <input type="checkbox"/>
					Est <input type="checkbox"/>	Est <input type="checkbox"/>

<i>Birth Year and Place</i>	
Year of Birth (Do not include month and day.)	Place of Birth
1950	Pittsburg, Kansas USA

<i>Marital Status</i>					
Check All That Describe Your Current Situation:					
Never Married	Married	Separated	Annulled	Divorced	Widowed
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	X <input type="checkbox"/>	<input type="checkbox"/>

<i>Spouse's Name (current spouse only)</i>			
Spouse's First Name	Spouse's Middle Name	Spouse's Last Name	Spouse's Suffix
None			

<i>Spouse's Other Names Used (current spouse only)</i>						
First Name	Middle Name	Last Name	Suffix	Check if Maiden Name	Name Used From (Month/Year) (Check box if estimate)	Name Used To (Month/Year) (Check box if estimate)
None					Est <input type="checkbox"/>	Est <input type="checkbox"/>
					Est <input type="checkbox"/>	Est <input type="checkbox"/>



Children's Names (if over 18)			
First Name	Middle Name	Last Name	Suffix
Donnis	Dean	Kirk	II

## 2. Education

List all post-secondary schools attended.

Name of School	Type of School (vocational/technical/trade school, college/university/military college, correspondence/distance/extension/online school)	Date Began School (month/year) (check box if estimate)	Date Ended School (month/year) (check box if estimate) (check "present" box if still in school)	Degree	Date Awarded
Hutchinson Community Junior College	Community College	August 1968 <input checked="" type="checkbox"/> Est <input type="checkbox"/>	May 1970 <input checked="" type="checkbox"/> Est <input type="checkbox"/> Present <input type="checkbox"/>	A.A.	May 1970
Northern Arizona University	University	August 1970 <input checked="" type="checkbox"/> Est <input type="checkbox"/>	May 1972 <input checked="" type="checkbox"/> Est <input type="checkbox"/> Present <input type="checkbox"/>	B.S.	May 1972
Washburn University School of Law	Law School	August 1972 <input checked="" type="checkbox"/> Est <input type="checkbox"/>	May 1975 <input checked="" type="checkbox"/> Est <input type="checkbox"/> Present <input type="checkbox"/>	J.D.	May 1975
		<input type="checkbox"/> Est <input type="checkbox"/>	<input type="checkbox"/> Est <input type="checkbox"/> Present <input type="checkbox"/>		

### 3. Employment

(A) List all of your employment activities, including unemployment and self-employment. If the employment activity was military duty, list separate employment activity periods to show each change of military duty station. Do not list employment before your 18th birthday unless to provide a minimum of two years of employment history.

Type of Employment (Active Military Duty Station, National Guard/Reserve, USPHS Commissioned Corps, Other Federal employment, State Government (Non- Federal Employment), Self- employment, Unemployment, Federal Contractor, Non- Government Employment (excluding self-employment), Other	Name of Your Employer/ Assigned Duty Station	Most Recent Position Title/Rank	Location (City and State only)	Date Employment Began (month/year) (check box if estimate)	Date Employment Ended (month/year) (check box if estimate) (check "present" box if still employed)
Self Employed Contract Law Partner	Schmitz and Socarras, LLP	Partner (1099)	Falls Church, VA	Oct. 2014 <input type="checkbox"/> Est <input checked="" type="checkbox"/>	Present <input checked="" type="checkbox"/> Est <input type="checkbox"/>
Self Employed	Law Offices of Dennis Dean Kirk	Owner	Falls Church, VA	Jan. 2013 <input type="checkbox"/> Est <input checked="" type="checkbox"/>	Present <input checked="" type="checkbox"/> Est <input type="checkbox"/>
Self Employed Contract Law Partner	Joseph E. Schmitz, LLP	Partner (1099)	Falls Church, VA	Jan. 2013 <input type="checkbox"/> Est <input checked="" type="checkbox"/>	Oct. 2014 <input checked="" type="checkbox"/> Est <input type="checkbox"/>
United States Civil Service	Department of the Army	Associate General Counsel	Pentagon Arlington, VA	April 2007 <input type="checkbox"/> Est <input checked="" type="checkbox"/>	Dec. 2012 <input checked="" type="checkbox"/> Est <input type="checkbox"/>
United States Civil Service	Department of the Army	Special Assistant to the General Counsel	Pentagon Arlington, VA	May 2005 <input type="checkbox"/> Est <input checked="" type="checkbox"/>	April 2007 <input checked="" type="checkbox"/> Est <input type="checkbox"/>
Self Employed	Law Offices of Dennis Dean Kirk	Owner	Falls Church, VA	August 1993 <input type="checkbox"/> Est <input checked="" type="checkbox"/>	May 2005 <input checked="" type="checkbox"/> Est <input type="checkbox"/>
Law Partner	Slocum, Boddie, Murray, and Kirk	Partner	Falls Church, VA	July 1990 <input type="checkbox"/> Est <input checked="" type="checkbox"/>	August 1993 <input checked="" type="checkbox"/> Est <input type="checkbox"/>
Self Employed	Law Offices of Dennis Dean Kirk	Owner	Falls Church, VA	May 1982 <input type="checkbox"/> Est <input checked="" type="checkbox"/>	July 1990 <input checked="" type="checkbox"/> Est <input type="checkbox"/>
Attorney	Goff, Sims, Cloud, Sheppard & Walker, P.C.	Attorney	Washington, DC	June 1977 <input type="checkbox"/> Est <input checked="" type="checkbox"/>	May 1982 <input checked="" type="checkbox"/> Est <input type="checkbox"/>
Other Federal Employment	Interstate Commerce Commission	Trial Attorney, Director's Staff, Bureau of Enforcement	Washington, DC	August 1975 <input type="checkbox"/> Est <input checked="" type="checkbox"/>	June 1977 <input checked="" type="checkbox"/> Est <input type="checkbox"/>

Legal	Kansas Corporation Commission, Department of Transportation	DOT Legal Clerk to Director	Topeka, KS	August 1974	Est x <input type="checkbox"/>	May 1975	Est x <input type="checkbox"/>
Legal	National District Attorney's Association, Sedgwick County District Attorney	Honors Program Prosecutorial Internship	Wichita, KS	May 1974	Est x <input type="checkbox"/>	August 1974	Est x <input type="checkbox"/>
State Government	Senator Theodore Saar (Democrat)	Legislative Aide and Administrative Aide	Topeka, KS	August 1974	Est x <input type="checkbox"/>	May 1975	Est x <input type="checkbox"/>
Legal	Kansas Corporation Commission, Department of Transportation	DOT Legal Clerk to Director	Topeka, KS	August 1973	Est x <input type="checkbox"/>	May 1974	Est x <input type="checkbox"/>
State Government	Senator Theodore Saar (Democrat)	Legislative Aide and Administrative Aide	Topeka, KS	August 1973	Est x <input type="checkbox"/>	May 1974	Est x <input type="checkbox"/>

(B) List any advisory, consultative, honorary or other part-time service or positions with federal, state, or local governments, not listed elsewhere.

Name of Government Entity	Name of Position	Date Service Began (month/year) (check box if estimate)	Date Service Ended (month/year) (check box if estimate) (check "present" box if still serving)
Consumer Protection Commission, Fairfax County VA	Commissioner	Oct. 1982 Est x <input type="checkbox"/>	Present Est x <input type="checkbox"/> Present <input type="checkbox"/>
		Est <input type="checkbox"/>	Est <input type="checkbox"/> Present <input type="checkbox"/>
		Est <input type="checkbox"/>	Est <input type="checkbox"/> Present <input type="checkbox"/>

#### 4. Potential Conflict of Interest

(A) Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent,

that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated. NONE.

(B) Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration or execution of law or public policy, other than while in a federal government capacity. NONE.

### **5. Honors and Awards**

List all scholarships, fellowships, honorary degrees, civilian service citations, military medals, academic or professional honors, honorary society memberships and any other special recognition for outstanding service or achievement.

- Secretary of the Army, Office of General Counsel
  - Meritorious Civilian Service Award (2012).
  - Décoration for Exceptional Civilian Service (2009).
  - Awarded Special Act or Service Award Bonus, \$5,000 (10/17/2008).
  - Awarded the Army General Staff Pin (2006).
  - Certificate of Appreciation for Outstanding Service, presented by Senior Deputy General Counsel (2005).
  - Awarded Performance Evaluation Pay/Bonus Increase, "Exceeds Expected Results" (3/15/2009).
  - Letter of Appreciation for Superb Leadership; 1/18/2006, for providing vision and legal services to Department of Defense in first wartime Quadrennial Defense Review (2005).
- Phi Kappa Phi National Honor Society
- Honors Program Prosecutorial Internship, Sedgewick County District Attorney (1974)

### **6. Memberships**

List all memberships that you have held in professional, social, business, fraternal, scholarly, civic, or charitable organizations in the last 10 years.

Unless relevant to your nomination, you do NOT need to include memberships in charitable organizations available to the public as a result of a tax deductible donation of \$1,000 or less, Parent-Teacher Associations or other organizations connected to schools attended by your children, athletic clubs or teams, automobile support organizations (such as AAA), discounts clubs (such as Groupon or Sam's Club), or affinity memberships/consumer clubs (such as frequent flyer memberships).

<b>Name of Organization</b>	<b>Dates of Your Membership (You may approximate)</b>	<b>Position(s) Held</b>
Joppa Lodge No. 35, F.A.A.M.	Circa 1984-date	Past Master 1990, 1997, & 2007
Anacostia Lodge No. 21, F.A.A.M.	Circa 1990-date	
La France Lodge No. 93 F.A.A.M.	Circa 1993-date	Founding Member
Scottish Rite, Northern Jurisdiction	Circa 1985-date	32nd degree
Almas Shrine Temple	Circa 1986-date	
Tall Cedars of Lebanon	Circa 1986-date	
Federalist Society	Circa 2005-date	
Heritage Foundation	Circa 2005-date	
Fairfax County Republican Committee	Circa 1979-date	
Judicial Watch	Circa 2016-date	
American Civil Liberties Union	Circa 1985-date	
Washington DC Police Foundation	Circa 2016-date	
Association United States Army	Circa 2009-date	
National Women's History Museum	Circa 1996-date	Charter Member
Army Historical Foundation	Circa 2009-date	
Phi Alpha Delta Law Fraternity, International	Circa 1973-date	Former Justice of National Capital Chapter, PAD, 1975

Kansas Bar Association	Circa 1973-date	
District of Columbia Bar Association	Circa 1977-date	
Virginia Bar Association	Circa 1990-date	
National Museum of the U.S. Army	Circa 2009-date	Founding Member
Hunters for the Hungry	Circa 2005-date	
Rocky Mountain Elk Foundation	Circa 2005-date	
National Rifle Association	Circa 1982-date	
Annandale United Methodist Church	Circa 1995-date	
DC Grand Lodge of Masons	Circa 1984-date	Valentine Reintzel Award
Republican National Lawyers Association	Circa 2005-date	
Senior Executives Association	Circa 2007-date	
Pittsburg Musicians' Protective Union, Lodge No. 452 (American Federation of Musicians' Union)	1966-date	Member Emeritus (since 1977)
Ducks Unlimited	Circa 2007-date	
Rowland Ward Guild of Field Sportsmen	Circa 2008-date	
Fairfax Rod and Gun Club	Circa 1990-date	
Republican National Committee President's Club	Circa 2005-date	
Republican Party of Virginia	Circa 1979-date	

Consumer Protection Commission, Fairfax County (VA)	1982-date	Member; former Chair, Vice Chair, Secretary
Northern Arizona University Alumni Association	Circa 2010-date	
College High School (Pittsburg, KS) Alumni Association	Circa 1980-date	
Hutchinson Community Junior College Alumni Association	Circa 2010-date	
Washburn University Alumni Association	Circa 1977-date	
Washburn University School of Law Alumni Association	Circa 1977-date	
Arlington Royal Arch Chapter No. 35	Circa 1989-date	
National Republican Senatorial Committee	Circa 2004-date	
Safari Club International	Circa 2002-date	
Safari Club International -- Washington Metropolitan Chapter	Circa 2007-date	
Safari Club International -- Chesapeake Chapter	Circa 2007-date	
Safari Club International -- National Capitol Chapter	Circa 2007-date	
Association of Former Intelligence Officers	Circa 2007-date	
American Association of Retired Persons	Circa 2005-date	

### 7. Political Activity

(A) Have you ever been a candidate for or been elected or appointed to a political office?

<u>Name of Office</u>	<u>Elected/Appointed/ Candidate Only</u>	<u>Year(s) Election Held or Appointment Made</u>	<u>Term of Service (if applicable)</u>
Ravenwood Precinct Chair, Mason District, Fairfax County Republican Committee, VA	Elected	Est. 1979-1990; 1994-2005	
County Committee Member, Fairfax County Republican Committee, VA	Elected	Est. 1979-present	

(B) List any offices held in or services rendered to a political party or election committee during the last ten years that you have not listed elsewhere.

<u>Name of Party/Election Committee</u>	<u>Office/Services Rendered</u>	<u>Responsibilities</u>	<u>Dates of Service</u>
Donald J. Trump for President, Inc.	Volunteer, Advisor Coalitions Development	Developed Coalitions	May-December 2016

(C) Itemize all individual political contributions of \$200 or more that you have made in the past five years to any individual, campaign organization, political party, political action



committee, or similar entity. Please list each individual contribution and not the total amount contributed to the person or entity during the year.

Name of Recipient	Amount	Year of Contribution
Adam Laxalt for Governor of Nevada	500	2017
Donald J. Trump for President, Inc. (General and Primary)	250, 250, 250, 250, 250, 250, 1000.	2016
Trump Victory	500	2016
Republican Party of Virginia	250	2016
Republican National Committee	750, 250	2016
Fairfax County Republican Committee	240	2016
JEB 2016 INC.	250	2015
Republican National Committee	750, 200	2015
Right to Rise USA	250	2015
Suzanne Scholte for Congress	200	2014
Republican National Committee	1000 est.	2014
Republican National Committee	1000 est.	2013
Re-elect Tim Griffin for Congress	252	2013
Republican National Committee	500	2012
Alan Cobb for Congress *	(Gave 1000, which was returned by campaign)	2016

### 8. Publications and Speeches

(A) List the titles, publishers and dates of books, articles, reports or other published materials that you have written, including articles published on the Internet; Please provide the Committee with copies of all listed publications. In lieu of hard copies, electronic copies can be provided via e-mail or other digital format.

Title	Publisher	Date(s) of Publication
None in last 15 years		
Lifting & Transportation International magazine	B & B PUBLISHING, INC. and Publishing's Magazine	Irregular column circa 1982-2000  I do not have copies of these columns. The magazine is out of business.

**(B) List any formal speeches you have delivered during the last five years and provide the Committee with copies of those speeches relevant to the position for which you have been nominated. Include any testimony to Congress or any other legislative or administrative body. These items can be provided electronically via e-mail or other digital format.**

[illegible]

**(C) List all speeches and testimony you have delivered in the past ten years, except for those the text of which you are providing to the Committee.**

Title	Place/Audience	Date(s) of Speech
None in last 10 years		

### 9. Criminal History

Since (and including) your 18<sup>th</sup> birthday, has any of the following happened?

- \* Have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you? (Exclude citations involving traffic infractions where the fine was less than \$300 and did not include alcohol or drugs.) NO.

- Have you been arrested by any police officer, sheriff, marshal or any other type of law enforcement official? **NO.**
- Have you been charged, convicted, or sentenced of a crime in any court? **NO.**
- Have you been or are you currently on probation or parole? **NO.**
- Are you currently on trial or awaiting a trial on criminal charges? **NO.**
- To your knowledge, have you ever been the subject or target of a federal, state or local criminal investigation? **NO.**

**If the answer to any of the questions above is yes, please answer the questions below for each criminal event (citation, arrest, investigation, etc.). If the event was an investigation, where the question below asks for information about the offense, please offer information about the offense under investigation (if known).**

A) Date of offense:

a. Is this an estimate (Yes/No):

B) Description of the specific nature of the offense:

C) Did the offense involve any of the following?

- 1) Domestic violence or a crime of violence (such as battery or assault) against your child, dependent, cohabitant, spouse, former spouse, or someone with whom you share a child in common: **Yes / No.**
- 2) Firearms or explosives: **Yes / No.**
- 3) Alcohol or drugs: **Yes / No.**

D) Location where the offense occurred (city, county, state, zip code, country):

E) Were you arrested, summoned, cited or did you receive a ticket to appear as a result of this offense by any police officer, sheriff, marshal or any other type of law enforcement official: **Yes / No**

1) Name of the law enforcement agency that arrested/cited/summoned you:

2) Location of the law enforcement agency (city, county, state, zip code, country):

F) As a result of this offense were you charged, convicted, currently awaiting trial, and/or ordered to appear in court in a criminal proceeding against you: **Yes / No**

1) If yes, provide the name of the court and the location of the court (city, county, state, zip code, country):

2) If yes, provide all the charges brought against you for this offense, and the outcome of each charged offense, (such as found guilty, found not-guilty, charge dropped or "nolle pros," etc). If you were found guilty of or pleaded guilty to a lesser offense, list separately both the original charge and the lesser offense:

3) If no, provide explanation:

G) Were you sentenced as a result of this offense: Yes / No

H) Provide a description of the sentence:

I) Were you sentenced to imprisonment for a term exceeding one year: Yes / No

J) Were you incarcerated as a result of that sentence for not less than one year: Yes / No

K) If the conviction resulted in imprisonment, provide the dates that you actually were incarcerated:

L) If conviction resulted in probation or parole, provide the dates of probation or parole:

M) Are you currently on trial, awaiting a trial, or awaiting sentencing on criminal charges for this offense: Yes / No

N) Provide explanation:

#### **10. Civil Litigation and Administrative or Legislative Proceedings**

(A) Since (and including) your 18th birthday, have you been a party to any public record civil court action or administrative or legislative proceeding of any kind that resulted in (1) a finding of wrongdoing against you, or (2) a settlement agreement for you, or some other person or entity, to make a payment to settle allegations against you, or for you to take, or refrain from taking, some action. Do NOT include small claims proceedings.

<u>Date Claim/Suit Was Filed or Legislative Proceedings Began</u>	<u>Court Name</u>	<u>Name(s) of Principal Parties Involved in Action/Proceeding</u>	<u>Nature of Action/Proceeding</u>	<u>Results of Action/Proceeding</u>
Circa 1992	Fairfax County Court, VA	Charles E. Smith Realty vs Slocum, Boddie, Murray, and Kirk (law firm)	Law office rents and lease modification litigation	Settled favorably to Realty

(B) In addition to those listed above, have you or any business of which you were an officer, director or owner ever been involved as a party of interest in any administrative agency proceeding or civil litigation? Please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

<u>Date Claim/Suit Was Filed</u>	<u>Court Name</u>	<u>Name(s) of Principal Parties Involved in Action/Proceeding</u>	<u>Nature of Action/Proceeding</u>	<u>Results of Action/Proceeding</u>
Circa 1985	Fairfax County Court, VA	Dennis Dean Kirk, Esq. vs Joe Felter	Collection of Attorney Fees from Client	Settled favorably to Counsel

(C) For responses to the previous question, please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

Settlement in both cases.

#### 11. Breach of Professional Ethics

A) Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency, professional association, disciplinary committee, or other professional group? Exclude cases and proceedings already listed.

No.

<u>Name of Agency/Association/Committee/Group</u>	<u>Date Citation/Disciplinary Action/Complaint Issued/Initiated</u>	<u>Describe Citation/Disciplinary Action/Complaint</u>	<u>Results of Disciplinary Action/Complaint</u>

B) Have you ever been fired from a job, quit a job after being told you would be fired, left a job by mutual agreement following charges or allegations of misconduct, left a job by mutual agreement following notice of unsatisfactory performance, or received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as violation of a security policy?

No.

**12) Tax Compliance**

(This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

**REDACTED**



**REDACTED**

**13. Lobbying**

In the past ten years, have you registered as a lobbyist? If so, please indicate the state, federal, or local bodies with which you have registered (e.g., House, Senate, California Secretary of State).

No.

#### 14. Outside Positions

☒ See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

For the preceding ten calendar years and the current calendar year, report any positions held, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. **Exclude** positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

<u>Name of Organization</u>	<u>Address of Organization</u>	<u>Type of Organization</u> (corporation, firm, partnership, other business enterprise, other non-profit organization, educational institution)	<u>Position Held</u>	<u>Position Held From</u> (month/year)	<u>Position Held To</u> (month/year)

#### 15. Agreements or Arrangements

☒ See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

As of the date of filing your OGE Form 278, report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment.

Provide information regarding any agreements or arrangements you have concerning (1) future employment; (2) a leave of absence during your period of Government service; (3) continuation of payments by a former employer other than the United States Government; and (4) continuing participation in an employee welfare or benefit plan maintained by a former employer other than United States Government retirement benefits.

Status and Terms of Any Agreement or Arrangement	Parties	Date (month/year)

#### **16. Additional Financial Data**

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

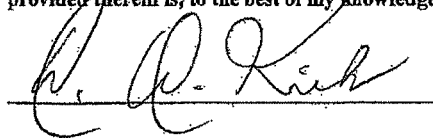
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**SIGNATURE AND DATE**

I hereby state that I have read the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

  
\_\_\_\_\_

This 28<sup>th</sup> day of March, 2018,

**REDACTED**

UNITED STATES OFFICE OF  
GOVERNMENT ETHICS

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March 21, 2018

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security  
and Governmental Affairs  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Dennis D. Kirk, who has been nominated by President Trump for the position of Member and Chairman, Merit Systems Protection Board.

We have reviewed the report and have obtained advice from the agency concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is an ethics agreement outlining the actions that the nominee will undertake to avoid conflicts of interest. Unless a date for compliance is indicated in the ethics agreement, the nominee must fully comply within three months of confirmation with any action specified in the ethics agreement.

Based thereon, we believe that this nominee is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,  
DAVID  
APOL

Digitally signed by DAVID APOL  
DN: cn=DAVID APOL, o=Office  
of Government Ethics, ou=DAVID APOL,  
c=US, email=DAVID.APOL@OGE.EOP  
Date: 2018.03.21 12:45:45 -0400

David J. Apol

Acting Director and General Counsel

Enclosures

**REDACTED**


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★ ★ ★ ★

Treyer Mason-Gale  
 Alternate Designated Agency Ethics Official  
 U.S. Merit Systems Protection Board  
 1615 M Street, N.W.  
 Washington, DC 20419

March 15, 2018

Dear Mr. Mason-Gale:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Member and Chairman of the Merit Systems Protection Board.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

I am the sole proprietor of my law firm, which does business as The Law Offices of Dennis Dean Kirk, Esq. I am also a contract attorney with the law firm of Schmitz & Socarras, LLP. Upon confirmation, I will cease providing services to my clients and I will refer them to other legal counsel for any ongoing legal matters. I will complete all such referrals before I assume the duties of the position of Member and Chairman. If I agree to accept any payment for referrals, I will consult your office regarding the applicability of 18 U.S.C. §§ 203, 205, and 209 before I receive any such payment. Upon confirmation, I will resign from my position with Schmitz & Socarras, LLP, and my law firm will cease engaging in any business, including the representation of clients. During my appointment to the position of Member and Chairman, my law firm will remain dormant and will not advertise. I will not perform any services for the firm, except that I will comply with any requirements involving legal filings, taxes and fees that are necessary to maintain my law firm while it is in an inactive status. As a Member and Chairman, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of The Law Offices of Dennis Dean Kirk, Esq. In addition, I will not participate personally and substantially in any particular matter involving specific parties in which I know Schmitz & Socarras, LLP or a former client of mine is a party or represents a party for a period of one year after I last provided service to Schmitz & Socarras, LLP or to a client of mine, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

In addition, I may receive a contingency fee payment in a personal injury case. The Law Offices of Dennis Dean Kirk, Esq. and the law firm of Schmitz & Socarras made a case referral of this matter to Peter DePaolis, Esq., of Koonz McKinney, Johnson, DePaolis, & Lightfoot law

firm ("Koonz Law Firm") for case litigation. If the Koonz Law Firm is successful in litigating this referral, I am entitled to receive a contingency fee payment that is one-third of 33.333% of any amount of the successful gross recovery. This contingency distribution will be paid to me in a lump sum payment if and when monies are received by the firm and this may occur after I enter Government service. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the ability or willingness of the Koonz Law Firm or Peter DePaolis, Esq., or any opposing party to make any payments related to this case, unless I first obtain a written waiver pursuant to 18 U.S.C. § 208(b)(1).

Upon confirmation, I will also resign from my position with the Consumer Protection Commission of Fairfax County, Virginia. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know the Consumer Protection Commission is a party or represents a party, unless I am first authorized to participate pursuant to 5 C.F.R. § 2635.502(d).

I will retain my position as a trustee of the Kirk Trust. I will not receive any fees for the services that I provide as a trustee during my appointment to the position of Chairman. I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on the financial interests of the Kirk Trust, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2).

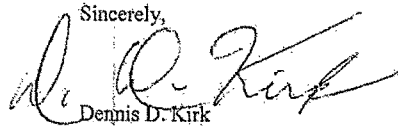
If I have a managed account or otherwise use the services of an investment professional during my appointment, I will ensure that the account manager or investment professional obtains my prior approval on a case-by-case basis for the purchase of any assets other than cash, cash equivalents, investment funds that qualify for the exemption at 5 C.F.R. § 2640.201(a), obligations of the United States, or municipal bonds.

I understand that as an appointee I will be required to sign the Ethics Pledge (Exec. Order No. 13770) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this ethics agreement.

I will meet in person with you during the first week of my service in the position of Chairman in order to complete the initial ethics briefing required under 5 C.F.R. § 2638.305. Within 90 days of my confirmation, I will document my compliance with this ethics agreement by notifying you in writing when I have completed the steps described in this ethics agreement.

I have been advised that this ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

Sincerely,



Dennis D. Kirk

**U.S. Senate Committee on Homeland Security and Governmental Affairs  
Pre-hearing Questionnaire  
For the Nomination of Dennis Dean Kirk to be  
Member and Chairman, Merit Systems Protection Board**

**I. Nomination Process and Conflicts of Interest**

1. Did the President give you specific reasons why he nominated you to be the Chairman of the Merit Systems Protection Board (MSPB)?

**I have not met with the President, nor has he given me reasons (specific or otherwise) for my selection.**

2. Were any conditions, expressed or implied, attached to your nomination? If so, please explain.

**None. No conditions, expressed or implied, were attached to my nomination.**

3. Have you made any commitments with respect to the policies and principles you will attempt to implement as Chairman of the MSPB? If so, what are they, and to whom the commitments made?

**No.**

4. Are you aware of any business relationship, dealing, or financial transaction that could result in a possible conflict of interest for you or the appearance of a conflict of interest? If so, please explain what procedures you will use to recuse yourself or otherwise address the conflict. And if you will recuse yourself, explain how you will ensure your responsibilities are not affected by your recusal.

**No. I have closed my law firm of Dennis Dean Kirk, Esq. I have terminated all contract partner business relationships with Schmitz and Soccares, LLP. For your information, I will resign from being Commissioner of the Fairfax County (VA) Consumer Protection Commission. I will avoid all conflicts of interest and appearance of conflicts, pursuant to applicable laws, rules, and regulations. The recusal of one MSPB member on any single matter does not prevent that matter being adjudicated.**

**II. Background of the Nominee**

5. What specific background and experience affirmatively qualify you to be Chairman of MSPB?

**I have 40-plus years' experience as an attorney representing employees before administrative agencies, courts, and companies; litigating matters relating to such issues on their behalf. I created a U.S. Department of the Army Office of General Counsel (OGC) Alternative Dispute Resolution group. While in the Army OGC, I managed about**



**200 military and civilian attorneys involving Army employee modernizations, updates of processes, and strategic policy improvements.**

6. What experience, if any, do you have in deciding cases, resolving disputes, or performing the other duties required in serving as Chairman of the MSPB?

**Created an Alternate Dispute Resolution Office for the Army OGC. I have more than 40 years' experience representing matters in court, civil, criminal, mediation, arbitration, and administrative procedure actions serving employees. I also have 35 years as a Commissioner on the Fairfax County (VA) Consumer Protection Commission.**

7. Please describe:
  - a. Your leadership and management style.

**Collaborative; listening to all points of view; researching Constitution, laws, and regulations; and engaging in discussions with colleagues before decisions.**

- b. Your experience managing personnel.

**Managed more than 200 military and civilian attorneys in the Army OGC for modernization into the 21<sup>st</sup> Century. Created, organized, and ran *Lean Six Sigma* business improvement teams for attorneys.**

- c. What is the largest number of people that have worked under you?

**More than 200 Army attorneys (military and civilian) that I personally managed in 15 team units over a 2-year period.**

### **III. Role of Chairman, MSPB**

8. The Civil Service Reform Act requires that individuals appointed to the MSPB “demonstrate[] [the] ability, background, training, or experience” necessary to “carry out functions of the Board.”<sup>1</sup> Please describe how your abilities, background, training, and experience qualify you for the position of Chairman of the MSPB.

**My civilian and government-related practice for the last 40+ years as a Federal civilian employee, political appointee, and Highly Qualified Expert in employment law, has served to hone my skills and enable my service to offer employees a fair hearing of their grievances, guide studies to improve processes, and develop agency-to-agency relationships.**

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<sup>1</sup> 5 U.S.C. § 1201.

9. In your opinion, what is the role of the MSPB? What is the role of Chairman in carrying out the statutory objectives of the MSPB?

**For both questions, I would follow the enabling statute. 5 U.S.C. §1204 sets forth MSPB's main responsibilities to (1) adjudicate matters within its jurisdiction and enforce compliance; (2) conduct special studies relating to the civil service and to other merit systems in the executive branch; and (3) review significant rules and regulations of the Office of Personnel Management (OPM). Pursuant to 5 U.S.C. § 1203(a), the Board Chairman is the chief executive and administrative officer of the agency.**

10. MSPB's mission is to "protect the Merit System Principles and promote an effective Federal workforce free of Prohibited Personnel Practices." How do you envision fulfilling MSPB's mission both day-to-day, and long-term?

**To serve and protect the merit system principles, fairly adjudicate whistleblower claims, and maintain the integrity of the Federal civil service. Study the workforce for continuous and steady improvements and report to Congress and the American people about its governance.**

**By following the Constitution, laws, rules, and regulations, in all matters; including, but not limited to, deciding matters fairly and without bias. Protecting the merit system principles to produce an equitable process for all employees to enforce their rights and privileges while meeting their duties and responsibilities to the public.**

11. What do you anticipate being the greatest challenge you would face as Chairman of the MSPB, and how would you seek to prepare for and address those challenges?

**A backlog reported to be over 1,300 cases. While not presuming confirmation, under the authority of 5 U.S.C. § 1204 (n), I will seek shared services with other agencies for temporarily assigned or detailed staffing to work through this backlog. I will seek to streamline and remove any obstructions or delays to fair adjudication.**

12. What do you believe to be the top challenges facing the federal workforce today? What steps do you plan to take to address these challenges, if confirmed as Chairman? Please explain.

**Communications, fair treatment, and solid knowledge of employee-employer expectations. Justice delayed is justice denied; so MSPB must provide employees with reliable and rapid service to hear and decide their cases as is possible and realistic.**

13. Do you believe you will review and adjudicate cases that come before you with good judgment and impartiality? Please explain, citing examples of prior work or experience that could bear on your abilities, if applicable.

**Yes. I have served for 35 years as a Commissioner of Consumer Protection for Fairfax County, VA, and heard hundreds of issues and dealt with each using an even, steady hand by understanding and following laws, rules, and regulations. When at the Department of the Army, all involved received impartial and unbiased results and equal justice.**

#### **IV. Policy Questions**

14. What role do you think alternative dispute resolution options, including the Mediation Appeals Program, should play in the MSPB adjudication and enforcement process?

**Alternate dispute resolution generally, and MSPB's Mediation Appeals Program (MAP) in particular, can move matters to conclusions and speedily help employees and agencies reach fair and equitable outcomes. MAP in-house mediators are trained and certified and operate confidentially. MAP is an excellent option when both parties agree to seek swift and just resolution of their cases, separate from their work with an adjudicating A.J.**

15. MSPB is statutorily responsible for conducting oversight of the Office of Personnel Management's significant actions. How will you coordinate with OPM to ensure that significant actions conform to the merit systems principles outlined in 5 U.S.C. § 2301?

**MSPB leadership and staff have a duty to examine OPM's significant actions under its statutory obligations (Title 5 of the U.S. Code). There will be regular lines of communication activated between the Chairman and the leadership of OPM to promote, foster, and encourage the merit system principles.**

16. MSPB previously highlighted the need to examine the prevalence and forms of reprisal for protected activity, particularly for whistleblowing.<sup>2</sup> Do you view reprisal for whistleblowing as a significant challenge facing the federal workforce? Why or why not?

**Yes. While I haven't seen recent data, I believe whistleblowers are a valuable, proven, critical enhancement of the Federal workforce system. They often provide a valued service by bringing to light violations of laws and waste, fraud, and abuse. Prohibited Personnel Practices are guarded against by whistleblowers. Reprisals are appropriately prohibited; and will be investigated by agencies and OSC, and adjudicated by MSPB.**

<sup>2</sup> Merit Systems Protection Board, MSPB Research Agenda 2015-2018 (Feb. 2015), available at <https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumbe r=1140540&version=1145045&application=ACROBAT>.

17. In your opinion, is the underutilization of probationary periods a critical issue? If confirmed as Chairman of MSPB, what steps would you take to ensure that managers better utilize probationary periods?

**Yes. Employee problems often show up in probationary periods and managers should address them at that time in a swift manner.**

**If confirmed, I would ask MSPB to continue to study this issue to find the facts. By using the best practices we identify, federal managers can create a modern and respected Federal workforce.**

18. How do you view the role of information technology at MSPB as it relates to both day-to-day business and the overall mission objectives to uphold merit systems principles?

**Effective information security and data management demands the best available technological improvements to protect the Federal worker, prevent undue privacy losses, and maintain future data safety. A robust information technology (IT) program enhances MSPB's ability to safeguard the merit system principles, thus benefitting both the government and employees.**

**The MSPB IT staff is assiduously working to bring the agency into the next decade. As Chairman, I will work with the IT staff to set priorities and goals. Technology is changing rapidly; and what seems appropriate now is likely to be obsolete in a few years.**

19. What role do you think merit systems studies, published by MSPB, play in ensuring a competent and efficient federal workforce?

**MSPB has the statutory authority under 5 U.S.C. § 1204 to conduct special studies of any aspect of the civil service or other merit systems to ensure that they are free of Prohibited Personnel Practices.**

**These studies provide cutting-edge operating data; allowing and prompting improvements in real time and giving agencies the chance to make relevant changes to improve results. The studies assist in the development of a competent and efficient Federal workforce.**

- a. What steps would you take to ensure that MSPB's external reports address critical federal workforce issues?

**MSPB must constantly be cognizant of the changing language, skills, and needs of the Federal workforce to provide next-generation information through research. The Board will offer guidance and direction to those research efforts through a 5-year agenda. The current research agenda covers 2013-2018, so a new agenda will be established by the new Board.**

- .....b. What, if any, coordination do you believe should occur between MSPB and OPM to address federal workforce issues raised by MSPB studies?

**MSPB oversees and promotes merit principles and adjudicates PPPs; while OPM handles personnel rules and serves as the President's HR operation. While we will continue to share useful information with OPM, it is important that MSPB operate within its statutory responsibilities.**

20. According to MSPB's Fiscal Year 2017 annual report, 22 percent of MSPB employees, including 25 percent of administrative judges, are eligible to retire in the next two years. What steps will you take to ensure that MSPB conducts its own succession planning, so that you are able to execute your statutory duties?

**While not presuming confirmation, in light of these statistics I will address this matter by studying the continuity of operations plan (COOP) that MSPB is currently utilizing. As appropriate, I anticipate launching staff recruiters to bring in talented entrants to the MSPB in time for orderly transitions, development, and training.**

21. In March 2018, MSPB published an updated survey on sexual harassment in the federal workforce.<sup>3</sup> In this survey, 20.9 percent of women in the federal workforce and 8.7 percent of men experienced a type of sexual harassment in the two years preceding the survey.<sup>4</sup> Only eight percent of these employees believed corrective action was taken against the individual who committed the harassment, possibly resulting in employees not using agency procedures to report the harassment.<sup>5</sup> What do you believe is the role of MSPB in ensuring accountability against harassers in the federal workplace and in ensuring employees can report harassment without reprisal?

**Sexual harassment by managers and/or co-workers, is reprehensible and a Prohibited Personnel Practice. MSPB will take seriously claims of sexual harassment that are brought to us and adjudicate them appropriately. Promotion of workplace preventative education will increase freedom from Prohibited Personnel Practices.**

22. What steps can MSPB take to improve federal supervisors' knowledge and intra-agency support regarding disciplinary and removal processes?

**The OPM Learning Connection website has a training unit called "FY18 Addressing and Resolving Poor Performance" that gives intensive supervisor and management training within the laws and regulations. MSPB should continue such educational efforts, as this document is easy to follow and teaches how to manage employees properly in such circumstances.**

<sup>3</sup> Merit Systems Protection Board, Update on Sexual Harassment in the Federal Workforce (Mar. 2018), available at [https://www.mspb.gov/MSPBSE ARCH/viewdocs.aspx?docnumber=1500639&version=1506232&application=ACROBAT](https://www.mspb.gov/MSPBSE%20ARCH/viewdocs.aspx?docnumber=1500639&version=1506232&application=ACROBAT).

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Id.* at 8.

23. Protecting whistleblower confidentiality is of the utmost importance to this Committee.

a. During your career how have you addressed whistleblower complaints?

**I have vigorously done so in both civilian legal practice and Federal career attorney service. In all of such cases, I have advocated for whistleblower protections.**

b. How do you plan to implement policies within the MSPB to encourage employees to bring constructive suggestions forward without the fear of reprisal?

**Not presuming confirmation, I will continue MSPB's educational efforts on recognizing the right of whistleblowers to report waste, fraud, abuse, and similar offenses. MSPB has a website that covers these matters in detail. Its work under the NoFEAR Act is extensive and ongoing.**

c. Do you commit without reservation to work to ensure that any whistleblower within MSPB does not face retaliation?

**Yes.**

d. Do you commit without reservation to take all appropriate action if notified about potential whistleblower retaliation?

**Yes.**

#### **V. Relations with Congress**

24. Do you agree without reservation to comply with any request or summons to appear and testify before any duly constituted committee of Congress if you are confirmed?

**Yes, pursuant to following the laws and regulations allowing such disclosures or actions.**

25. Do you agree without reservation to make any subordinate official or employee available to appear and testify before, or provide information to, any duly constituted committee of Congress if you are confirmed?

**Yes, pursuant to following the laws and regulations allowing such disclosures or actions.**

26. Do you agree without reservation to comply fully, completely, and promptly to any request for documents, communications, or any other agency material or information from any duly constituted committee of the Congress if you are confirmed?

**Yes, pursuant to following the laws and regulations allowing such disclosures or actions.**

**VI. Assistance**

27. Are these answers your own? Have you consulted with MSPB or any other interested parties? If so, please indicate which entities.

**Yes. I have consulted with MSPB Acting Chairman Mark A. Robbins.**

**Minority Supplemental Pre-hearing Questionnaire  
For the Nomination of Dennis Dean Kirk to be  
Member and Chairman, Merit Systems Protection Board**

**I. Nomination Process and Conflicts of Interest**

1. Has the President or his staff asked you to sign a confidentiality or non-disclosure agreement?

**No.**

2. Has the President or his staff asked you to pledge loyalty to the President or the Administration?

**No.**

3. Have you ever represented a party in a matter before or involving the Merit Systems Protection Board (MSPB)?
  - a. If so, please describe the matter(s) and the nature of the representation.

**Yes. I represented a military and civilian Federal retiree who was denied benefits by OPM. I won the case; plus was awarded attorneys fees' for client reimbursement.**

4. As owner of the *Law Offices of Dennis Dean Kirk*, have you or anyone else associated with the firm, ever represented a company headquartered outside the United States?
  - a. If so, please provide the name of the client, along with a description of the matter(s) and the nature of the representation.

**Yes. In about 1984, I negotiated and represented a one-time contract where Cometto Industries (Milan, Italy) sold the Space Shuttle's land transport carrier computerized motor vehicle to NASA. This vehicle moved the Shuttle around the Space Dock Yards.**

**In addition, I searched myself on the computer this morning and came across an article that mentioned a case I had very limited involvement with, and had completely forgotten about: *PETA v. Sally Jewell, Secretary of the Interior, & U.S. Fish & Wildlife Service* (Case No. 1:15-CV-00600, E.D.VA, Judge Claude Hilton). Filed, May 8, 2015, dismissed for lack of jurisdiction, September 8, 2015.**



I represented The Conservation Force, Dallas Safari Club, and Republic of Namibia (Ministry of Environment and Tourism), all of which were seeking to support the U.S. Government against this suit to force it to cease importation of hunting trophies. I filed a motion to intervene as co-defendants on May 8, 2015. This motion was never ruled on, as the U.S. Government was granted its motion to dismiss for lack of jurisdiction four months later and the case was dismissed.

My understanding is that The Conservation Force sought the support and approval of the tourism hunting section of the Republic of Namibia's Ministry of Environment and Tourism. As a result, Namibia agreed to participate in the intervention motion. I never had direct or indirect contact with anyone from Namibia.

My short representation was done as a favor to a friend who was past president of the Safari Club, and also head of The Conservation Force. He is an attorney with a practice in Florida. His staff prepared the motion and had all the contact with the three clients. As a member of the Virginia bar, and admitted to practice in the E.D. VA, I was happy to be of assistance.

I charged no legal fees for my representation, and only billed the filing fee of \$75. While I represented these clients in my single capacity of the Law Office of Dennis Dean Kirk, the filing fee was billed through the system of Schmitz and Socarras, LLP.

I sincerely regret this omission from my original responses.

5. As partner of either *Schmitz and Socarras, LLP* or *Joseph E. Schmitz, LLP*, have you or anyone else associated with the firm, ever represented a company headquartered outside the United States?
  - a. If so, please provide the name of the client, along with a description of the matter(s) and the nature of the representation.

**As an outside contracted "partner" to *Schmitz and Socarras, LLP* or *Joseph E. Schmitz, LLP*, I was not aware of any such matter. Other than as identified above, I have never any person or entity headquartered outside the United States.**

6. Are you aware of any MSPB matters brought against one or more of your current partners at *Schmitz and Socarras, LLP*?
  - a. If so, please provide the name of the partner, along with a description of the matter? How will you address matters brought against individuals associated with your current firm?

**No.**

## II. Background of Nominee

7. Have you represented a whistleblower or other employee in an adversarial dispute against the federal government?

**Yes. Cases before FBI, DOD, CIA and State Department as well as other government agencies. Those persons are concerned about damages to their privacy and their personal protection, so I cannot discuss or divulge their names or secrets.**

8. Do you seek out dissenting views and how do you encourage constructive critical dialogue with subordinates?

**Constructive, diverse dialogue sharpens the discussion, creating more logical legal reasoning, and gets subordinates and colleagues engaged in energetic approaches and governance.**

9. What would you consider your greatest successes as a leader?

**Building collaborative consensus to create and achieve the best transforming modernization outcomes in government.**

10. Why do you want to serve as Chairman of MSPB?

**I would like to ensure positive, energetic, and meaningful merit systems protections and strong employee (e.g., whistleblower) rights by the MSPB in its duty as adjudicator of the merit system principles.**

11. Have you sought advice about the functioning of MSPB and your potential role?

**I have asked the Acting Chairman about positive opportunities that may exist, when a quorum is restored, on addressing the backlog.**

12. Through your experience, what practices would you consider vital to managing a federal workforce?

**The merit system principles help reduce instances of Prohibited Personnel Practices, and create a wholesome well-respected modern workforce where employees are proud to serve. When an agency fails its workers, whistleblowers must be protected. Studies of regulatory methods are essential to checking means and methods used today to improve tomorrow's workplace for all federal workers.**

13. How would you handle jurisdictional issues between agencies similar to MSPB, like the Equal Employment Opportunity Commission?

**In accordance with Congressionally passed laws and limits, I would adhere to the established jurisdictional issues. Collaborative discussions with Congress and these agencies will smooth out conflicts when they occur.**

14. Do you have experience addressing instances of prohibited personnel practices (PPPs)? If so, please generally describe those instances.

**While protecting clients' legal secrets, I have prevented political influences in the workforce, and represented clients that suffered PPPs.**

15. Do you have any experience adjudicating matters? If so, please provide an example.

**As an example, I have served for over 35 years as a Commissioner of the Fairfax County (VA) Consumer Protection Commission. This work involved hearing and adjudicating multi-issue disputes between parties, reviewing cable TV license applications, food license revocations, regulatory discipline matters of business employees, etc.**

16. If confirmed, as Chairman, you would be able to delegate certain responsibilities. Please describe how your experience will assist you in delegating authority in an efficient manner. What responsibilities would you seek to maintain for yourself?

**I practiced delegation using *Lean Six Sigma* when managing Army OGC teams. Each had anywhere from 3 to 30 in a group (up to 5 groups at a time of 10-15 each). I delegated to Team Captains and/or group leaders the daily and middle management responsibilities, leading by example and by oversight of a nature to gain knowledge and results while fostering their personal achievements. I also practiced delegation by creating and using sub-committees and committees in my work with the Consumer Protection Commission.**

17. How will your experience help MSPB maintain MSPB's Merit System Principles (MSPs)?

**The merit system principles viewed in light of a modern Federal workforce that functions to serve the American public, must be zealously preserved, promoted, and protected. I have done so for my clients and my agencies, and will do so for MSPB if confirmed.**

### III. Policy Questions

18. Precedents, findings, recommendations and reviews of Office of Personnel Management (OPM) rules by the MSPB have potential to directly affect how employees are managed and how their appeals are decided. What role do you believe the MSPB should play in developing personnel policy?

**None. MSPB must follow the Constitution, laws, and precedents to adjudicate high quality personnel decisions in accord with the merit system principles serving the Federal workforce; thereby preventing Prohibited Personnel Practices and retaliation against whistleblowers.**

19. The MSPB has the statutory responsibility to conduct objective, non-partisan studies that assess and evaluate Federal merit systems policies, operations, and practices. These studies are typically government-wide in scope and ensure that the workforce is managed in accordance with MSPs and is free from PPPs. What role do you believe MSPB's data collection should play in supporting personnel policy?

**It is essential that good, reliable, proven data be obtained to ensure integrity of conclusions and findings of MSPB proceedings. To support personnel policy, MSPB is the guardian at the gates; conducting studies to get on the ground facts to inform Federal personnel decisionmakers.**

20. MSPB has been without a quorum of Board members since January 8, 2017. The lack of a quorum contributes to delays in issuing final decisions in petitions for review (PFRs) and other cases filed at headquarters (HQ) and releasing reports of merit systems studies.

- a. The MSPB currently estimates that it will take months or longer to process the inventory of cases at HQ and to publish merit systems studies reports once new Board members are nominated and confirmed. Please describe how you will effectively and promptly address MSPB's current backlog.

**Not presuming confirmation, the authority of 5 U.S.C. § 1204 (n), may allow the Board to seek and expand partnerships with other agencies to accept shared services, and borrow detailees for ALJ, AJ and attorney functions. This brings to bear the increased temporary workforce needed to swiftly reduce the administrative backlog.**

- b. Please describe how your previous work experience has prepared you to address the challenges in resolving MSPB's backlog.

**In the Army, utilizing *Lean Six Sigma* and OGC modernization, I was able to partner with DoD entities to achieve exceptional temporary increases far beyond assigned regular staff there. I created great results by delivering products no one had achieved before then.**

- c. The MSPB Vice Chairman has voted on over 800 PFR cases which also await consideration by new Board members. If confirmed, please describe how you will work with your colleagues to consider cases awaiting decisions.

**Working together gets results. Each member is statutorily empowered to research, conclude, and write their own opinions. Collegial concurrences are both desirable and probable as the laws are clear in many areas.**

- d. Do you have experience with resolving backlogs such as the one faced by MSPB? If so, please describe your experience.

**Yes. There was a years' long delay in processing persons offering to serve as volunteer experts on the Army Science Board. This caused applications of exceptional people to stall and many withdrew. I assembled a *Lean Six Sigma* team, rewrote the flowchart, and changed the system managing the governance, and capping delays to 90 days maximum.**

- e. Have you sought advice from any current or former MSPB employees about how to best address the current backlog? If so, please describe your consultations.

**I have discussed the backlog in general with Mark Robbins, current Acting Chairman, and beyond the need for a 3 person board quorum nothing specific was mentioned.**

21. MSPB functions as an independent, third-party adjudicatory authority for employee appeals of adverse actions (e.g., removals, suspensions for more than 14 days, and furloughs) and retirement decisions.

- a. Please describe your experience in developing adjudicatory processes and procedures, issuing subpoenas, calling witnesses and enforcing decisions.

**As a trial attorney, I have dealt for 40+ years with complex multijurisdictional local, state, and Federal litigation, as well as litigated and been consulted on administrative agency law cases. I have often litigated trials in courts, and before administrative agencies in civil and criminal matters involving subpoenas, witnesses, and enforcement of judgments and court orders.**

- b. Please describe how your previous work experience has prepared you to execute and supervise these actions at MSPB.

**As a highly experienced litigator, I am confident in my ability to execute and supervise these actions at MSPB.**

22. How should Board members seek to safeguard their independence?

**Members of this independent Board must follow their duties and obligations under the Constitution, laws, regulations, and precedents; and they must stay strong in their independence to collaborate with their fellow members and observe rights and privileges of each of the members.**

23. MSPB was given the authority and responsibility to review the rules, regulations, and significant actions of OPM. Do you have any concerns about OPM's current rules, regulations or recent actions? If so, please describe those concerns.

**Not presuming confirmation, I cannot prejudge OPM actions at this point, as it would be prejudicial to a careful analysis to be conducted under our MSPB duties and obligations once in office.**

24. Do you believe MSPB has the resources it needs to meet current challenges? Please explain.

**It will need to address the more than 1,300 case backlog—when its normal process decision flow is approximately 75 cases per month (according to acting Chairman Mark Robbins), so borrowed resources of solid ALJs, AJs, and other attorneys might be needed.**

25. How will you address the occurrence of PPPs with internal employees of MSPB?

**Prohibited Personnel Practices are not to be tolerated, and I have no data on procedures at MSPB currently, so cannot comment on what is not known. I always would discourage PPPs.**

26. In some cases, complainants who may be better served by other government agencies such as the EEO or OSC seek assistance from the MSPB.

- a. How will you work to ensure that your staff effectively guides these complaints to the appropriate resources?

**By training in-house, the MSPB employee customer services can identify, properly address, and deliver options to complainants.**

- b. Will you collaborate with other government agencies to minimize duplication? If so, please describe how you will work to achieve this objective.

**Yes. Informational meetings, joint training sessions, and data exchanges will do a great deal to help resolve this objective. In addition, it will be continually studied for improvement in avoiding duplication.**

*Hatch Act*

27. What would you consider to be an appropriate penalty for a violation of the Hatch Act by a senior administration official?

**The Board does not adjudicate alleged Hatch Act violations by senior administration officials.**

*Whistleblower protections*

28. Please describe any previous experience-in the public or private sector-with handling whistleblower complaints, and what steps you took to ensure those individuals did not face retaliation and that their claims were thoroughly investigated?

**As private counsel to private corporate entities, contractor employees, and federal employees "blowing the whistle" on corrupt, criminal, fraud, or just waste and abuse issues, I zealously and vigorously fought as their champion defending their legal rights in every effort legally possible.**

29. OSC has filed an amicus brief opposing an MSPB decision that ruled against a whistleblower alleging retaliation because the MSPB said the whistleblower's disclosure was motivated by "interpersonal squabbling." Do you believe that the motive of the whistleblower should be considered when examining retaliation claims? Please explain.

**Not presuming confirmation, but I must not opine on what I do not now know and certainly do not want to prejudge any potential issues I may be addressing later.**

30. OSC filed three amicus briefs in 2017 opposing the MSPB's alleged attempts to impose higher procedural burdens on whistleblowers. Do you believe that whistleblowers should be subjected to higher procedural burdens before their cases are considered by administrative judges? Please explain.

**Not presuming confirmation, but I must not opine on what I do not now know and certainly do not want to prejudge any potential issues I may be addressing later.**

31. OSC has also filed amicus briefs opposing the application of higher evidentiary burdens on whistleblowers. OSC has written that this burden "runs directly counter to Congress's intent in passing the WPEA's enhanced protections for federal whistleblowers." Do you believe that any whistleblowers should be subjected to higher evidentiary burdens? Please explain.

**Not presuming confirmation, but I must not opine on what I do not now know and certainly do not want to prejudge any potential issues I may be addressing later.**

32.If confirmed, how will you ensure that whistleblower complaints are properly investigated?

**The protection of whistleblowers is a paramount function for good federal governance, and it is an essential protection of the workforce. Nothing less than an intense attention and assurance from OSC and MSPB of these employees is mandatory in my own opinion.**

#### **IV. Relations with Congress and the Public**

33.If confirmed, how will you make certain that you will respond in a timely manner to Member requests for information?

**Not presuming confirmation, I certainly will examine MSPB's Congressional relationship to build, foster and promote rapport to develop greater openness, transparency, and better partnerships.**

34.If confirmed, do you agree without reservation to reply to any reasonable request for information from the Ranking Member of any duly constituted committee of the Congress?

**Yes, pursuant to following the laws and regulations allowing such disclosures or actions.**

35.If confirmed, do you agree without reservation to reply to any reasonable request for information from members of Congress?

**Yes, pursuant to following the laws and regulations allowing such disclosures or actions.**

36.If confirmed, do you commit to take all reasonable steps to ensure that you and your agency comply with deadlines established for requested information?

**Yes.**

37.If confirmed, do you commit to protect subordinate officials or employees from reprisal or retaliation for any testimony, briefings or communications with members of Congress?

**Yes.**

38.If confirmed, will you ensure that your staff will fully and promptly provide information and access to appropriate documents and officials in response to requests made by the Government Accountability Office (GAO) and the Congressional Research Service?

**Yes.**



39. If confirmed, will you agree to work with representatives from this Committee and to promptly implement recommendations for improving MSPB's operations and effectiveness?

**Yes, pursuant to following the laws and regulations allowing such disclosures or actions; and presuming additional funding provided for additional personnel for such actions.**

40. If confirmed, will you direct your staff to fully and promptly respond to Freedom of Information Act requests submitted by the American people?

**Yes.**

41. If confirmed, will you ensure that political appointees are not inappropriately involved in the review and release of Freedom of Information Act requests?

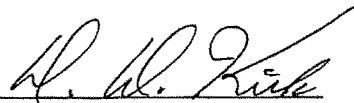
**Yes.**

**VI. Assistance**

42. Are these answers your own? Have you consulted with MSPB or any other interested parties?  
If so, please indicate which entities.

**Yes. I have consulted with MSPB Acting Chairman Mark A. Robbins.**

I, Dennis Kirk, hereby state that I have read the foregoing Pre-Hearing Questionnaire and Supplemental Questionnaire and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

  
(Signature)

This 18<sup>th</sup> day of July 2018

## Executive Branch Personnel

### Public Financial Disclosure Report (OGE Form 278e)

#### Filer's Information

Kirk, Dennis Dean

Member (Chairman), Merit Systems Protection Board

Other Federal Government Positions Held During the Preceding 12 Months:

None

Names of Congressional Committees Considering Nomination:

- Committee on Homeland Security and Governmental Affairs

Electronic Signature - I certify that the statements I have made in this form are true, complete and correct to the best of my knowledge.

/s/ Kirk, Dennis Dean [electronically signed on 11/03/2017 by Kirk, Dennis Dean in Integrity.gov]

Agency Ethics Official's Opinion - On the basis of information contained in this report, I conclude that the filer is in compliance with applicable laws and regulations (subject to any comments below).

/s/ Mason-Gale, Treyer, Certifying Official [electronically signed on 03/15/2018 by Mason-Gale, Treyer in Integrity.gov]

Other review conducted by

U.S. Office of Government Ethics Certification

/s/ Apol, David, Certifying Official [electronically signed on 03/21/2018 by Apol, David in Integrity.gov]

### 1. Filer's Positions Held Outside United States Government

#	ORGANIZATION NAME	CITY, STATE	ORGANIZATION TYPE	POSITION HELD	FROM	TO
1	Law Offices of Dennis Dean Kirk, Esq.	Falls Church, Virginia	Solo Legal Practice	Owner	12/2012	Present
2	Schmitz & Socarras, LLP	Falls Church, Virginia	Law Firm	Self Employed Contract Law Partner	10/2014	Present
3	Kirk Trust (revocable)	See Endnote	Trust	Trustee	4/2016	Present
4	Consumer Protection Commission	Fairfax County, Virginia	County Government	Commissioner	12/1982	Present

### 2. Filer's Employment Assets & Income and Retirement Accounts

#	DESCRIPTION	EIF	VALUE	INCOME TYPE	INCOME AMOUNT
1	Law Offices of Dennis Dean Kirk, Esq. (sole proprietor)	N/A	\$100,001 - \$250,000	Legal Fees	\$13,500
2	Schmitz & Socarras, LLP (law firm)	N/A	None (or less than \$1,001)	Legal fees	\$16,625
3	Koonz, McKenney, Johnson, DePaolis & Lightfoot, LLP	N/A	\$15,001 - \$50,000	Potential contingency fee case	\$0

### 3. Filer's Employment Agreements and Arrangements

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#	EMPLOYER OR PARTY		CITY, STATE	STATUS AND TERMS	DATE
1	Law Offices of Dennis Dean Kirk, Esq.	See Endnote	Falls Church, Virginia	The firm will be placed in an inactive status during my appointment and the amount or percentage for all outstanding and potential client fees will be fixed before I enter government service. Specifically, I have an agreement with Peter DePaolis, Esq. of Koontz, McKenney, Johnson, DePaolis & Lightfoot, LLP for a contingency fee of one-third of one-third of any award made in a personal injury matter that I referred to him that has not yet been filed with a court.	8/2015

#### 4. Filer's Sources of Compensation Exceeding \$5,000 in a Year

#	SOURCE NAME		CITY, STATE	BRIEF DESCRIPTION OF DUTIES
1	Law Offices of Dennis Dean Kirk, Esq.		Falls Church, Virginia	Legal services as a solo practitioner
2	Schmitz & Socarras, LLP		Falls Church, Virginia	Legal services as a contract attorney
3	Robert Stephenson		Alexandria, Virginia	Legal services

#### 5. Spouse's Employment Assets & Income and Retirement Accounts

None

#### 6. Other Assets and Income

#	DESCRIPTION	EIF	VALUE	INCOME TYPE	INCOME AMOUNT
1	MetLife (whole life)	N/A	\$1,001 - \$15,000		None (or less than \$201)
2	U.S. bank account (cash)	N/A	\$15,001 - \$50,000		None (or less than \$201)

## 7. Transactions

(N/A) - Not required for this type of report

## 8. Liabilities

#	CREDITOR NAME	TYPE	AMOUNT	YEAR INCURRED	RATE	TERM
1	Bank of America	Credit Card	\$15,001 - \$50,000	2017	10.99	Revolving
2	J. P. Morgan Chase	Mortgage on Personal Residence	\$250,001 - \$500,000	2012	3.625	30 years

## 9. Gifts and Travel Reimbursements

(N/A) - Not required for this type of report

## Endnotes

PART	#	ENDNOTE
1.	3	Established in compliance with the National Firearms Act, the trust contains non-revenue producing items used for sport.
3.	1	The personal injury matter is not one in which the USG is a party or has a substantial interest.



## Summary of Contents

### 1. Filer's Positions Held Outside United States Government

Part 1 discloses positions that the filer held at any time during the reporting period (excluding positions with the United States Government). Positions are reportable even if the filer did not receive compensation.

This section does not include the following: (1) positions with religious, social, fraternal, or political organizations; (2) positions solely of an honorary nature; (3) positions held as part of the filer's official duties with the United States Government; (4) mere membership in an organization; and (5) passive investment interests as a limited partner or non-managing member of a limited liability company.

### 2. Filer's Employment Assets & Income and Retirement Accounts

Part 2 discloses the following:

- Sources of earned and other non-investment income of the filer totaling more than \$200 during the reporting period (e.g., salary, fees, partnership share, honoraria, scholarships, and prizes)
- Assets related to the filer's business, employment, or other income-generating activities that (1) ended the reporting period with a value greater than \$1,000 or (2) produced more than \$200 in income during the reporting period (e.g., equity in business or partnership, stock options, retirement plans/accounts and their underlying holdings as appropriate, deferred compensation, and intellectual property, such as book deals and patents)

This section does not include assets or income from United States Government employment or assets that were acquired separately from the filer's business, employment, or other income-generating activities (e.g., assets purchased through a brokerage account). Note: The type of income is not required if the amount of income is \$0 - \$200 or if the asset qualifies as an excepted investment fund (EIF).

### 3. Filer's Employment Agreements and Arrangements

Part 3 discloses agreements or arrangements that the filer had during the reporting period with an employer or former employer (except the United States Government), such as the following:

- Future employment
- Leave of absence
- Continuing payments from an employer, including severance and payments not yet received for previous work (excluding ordinary salary from a current employer)
- Continuing participation in an employee welfare, retirement, or other benefit plan, such as pensions or a deferred compensation plan
- Retention or disposition of employer-awarded equity, sharing in profits or carried interests (e.g., vested and unvested stock options, restricted stock, future share of a company's profits, etc.)

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#### 4. Filer's Sources of Compensation Exceeding \$5,000 in a Year

Part 4 discloses sources (except the United States Government) that paid more than \$5,000 in a calendar year for the filer's services during any year of the reporting period.

The filer discloses payments both from employers and from any clients to whom the filer personally provided services. The filer discloses a source even if the source made its payment to the filer's employer and not to the filer. The filer does not disclose a client's payment to the filer's employer if the filer did not provide the services for which the client is paying.

#### 5. Spouse's Employment Assets & Income and Retirement Accounts

Part 5 discloses the following:

- Sources of earned income (excluding honoraria) for the filer's spouse totaling more than \$1,000 during the reporting period (e.g., salary, consulting fees, and partnership share)
- Sources of honoraria for the filer's spouse greater than \$200 during the reporting period
- Assets related to the filer's spouse's employment, business activities, other income-generating activities that (1) ended the reporting period with a value greater than \$1,000 or (2) produced more than \$200 in income during the reporting period (e.g., equity in business or partnership, stock options, retirement plans/accounts and their underlying holdings as appropriate, deferred compensation, and intellectual property, such as book deals and patents)

This section does not include assets or income from United States Government employment or assets that were acquired separately from the filer's spouse's business, employment, or other income-generating activities (e.g., assets purchased through a brokerage account). Note: The type of income is not required if the amount of income is \$0 - \$200 or if the asset qualifies as an excepted investment fund (EIF). Amounts of income are not required for a spouse's earned income (excluding honoraria).

#### 6. Other Assets and Income

Part 6 discloses each asset, not already reported, that (1) ended the reporting period with a value greater than \$1,000 or (2) produced more than \$200 in investment income during the reporting period. For purposes of the value and income thresholds, the filer aggregates the filer's interests with those of the filer's spouse and dependent children.

This section does not include the following types of assets: (1) a personal residence (unless it was rented out during the reporting period); (2) income or retirement benefits associated with United States Government employment (e.g., Thrift Savings Plan); and (3) cash accounts (e.g., checking, savings, money market accounts) at a single financial institution with a value of \$5,000 or less (unless more than \$200 of income was produced). Additional exceptions apply. Note: The type of income is not required if the amount of income is \$0 - \$200 or if the asset qualifies as an excepted investment fund (EIF).

#### 7. Transactions

Part 7 discloses purchases, sales, or exchanges of real property or securities in excess of \$1,000 made on behalf of the filer, the filer's spouse or dependent child during reporting period.

This section does not include transactions that concern the following: (1) a personal residence, unless rented out; (2) cash accounts (e.g., checking, savings, CDs, money market accounts) and money market mutual funds; (3) Treasury bills, bonds, and notes; and (4) holdings within a federal Thrift Savings Plan account. Additional exceptions apply.

#### **8. Liabilities**

Part 8 discloses liabilities over \$10,000 that the filer, the filer's spouse or dependent child owed at any time during the reporting period.

This section does not include the following types of liabilities: (1) mortgages on a personal residence, unless rented out (limitations apply for PAS filers); (2) loans secured by a personal motor vehicle, household furniture, or appliances, unless the loan exceeds the item's purchase price; and (3) revolving charge accounts, such as credit card balances, if the outstanding liability did not exceed \$10,000 at the end of the reporting period. Additional exceptions apply.

#### **9. Gifts and Travel Reimbursements**

This section discloses:

- Gifts totaling more than \$390 that the filer, the filer's spouse, and dependent children received from any one source during the reporting period.
- Travel reimbursements totaling more than \$390 that the filer, the filer's spouse, and dependent children received from any one source during the reporting period.

For purposes of this section, the filer need not aggregate any gift or travel reimbursement with a value of \$156 or less. Regardless of the value, this section does not include the following items: (1) anything received from relatives; (2) anything received from the United States Government or from the District of Columbia, state, or local governments; (3) bequests and other forms of inheritance; (4) gifts and travel reimbursements given to the filer's agency in connection with the filer's official travel; (5) gifts of hospitality (food, lodging, entertainment) at the donor's residence or personal premises; and (6) anything received by the filer's spouse or dependent children totally independent of their relationship to the filer. Additional exceptions apply.

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#### Privacy Act Statement

Title I of the Ethics in Government Act of 1978, as amended (the Act), 5 U.S.C. app. 5 101 et seq., as amended by the Stop Trading on Congressional Knowledge Act of 2012 (Pub. L. 112-105) (STOCK Act), and 5 C.F.R. Part 2634 of the U. S. Office of Government Ethics regulations require the reporting of this information. The primary use of the information on this report is for review by Government officials to determine compliance with applicable Federal laws and regulations. This report may also be disclosed upon request to any requesting person in accordance with sections 105 and 402(b)(1) of the Act or as otherwise authorized by law. You may inspect applications for public access of your own form upon request. Additional disclosures of the information on this report may be made: (1) to any requesting person, subject to the limitation contained in section 208(d)(1) of title 18, any determination granting an exemption pursuant to sections 208(b)(1) and 208(b)(3) of title 18; (2) to a Federal, State, or local law enforcement agency if the disclosing agency becomes aware of violations or potential violations of law or regulation; (3) to another Federal agency, court or party in a court or Federal administrative proceeding when the Government is a party or in order to comply with a judge-issued subpoena; (4) to a source when necessary to obtain information relevant to a conflict of interest investigation or determination; (5) to the National Archives and Records Administration or the General Services Administration in records management inspections; (6) to the Office of Management and Budget during legislative coordination on private relief legislation; (7) to the Department of Justice or in certain legal proceedings when the disclosing agency, an employee of the disclosing agency, or the United States is a party to litigation or has an interest in the litigation and the use of such records is deemed relevant and necessary to the litigation; (8) to reviewing officials in a new office, department or agency when an employee transfers or is detailed from one covered position to another; (9) to a Member of Congress or a congressional office in response to an inquiry made on behalf of an individual who is the subject of the record; (10) to contractors and other non-Government employees working on a contract, service or assignment for the Federal Government when necessary to accomplish a function related to an OGE Government-wide system of records; and (11) on the OGE Website and to any person, department or agency, any written ethics agreement filed with OGE by an individual nominated by the President to a position requiring Senate confirmation. See also the OGE/GOVT-1 executive branch-wide Privacy Act system of records.

#### Public Burden Information

This collection of information is estimated to take an average of three hours per response, including time for reviewing the instructions, gathering the data needed, and completing the form. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Program Counsel, U.S. Office of Government Ethics (OGE), Suite 500, 1201 New York Avenue, NW., Washington, DC 20005-3917.

Pursuant to the Paperwork Reduction Act, as amended, an agency may not conduct or sponsor, and no person is required to respond to, a collection of information unless it displays a currently valid OMB control number (that number, 3209-0001, is displayed here and at the top of the first page of this OGE Form 278e).

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**Chairman Ron Johnson  
Post-Hearing Questions for the Record  
Submitted to Mr. Dennis Kirk**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,  
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,  
Andrew F. Maunz to be a Member of the Merit Systems Protection Board, and  
Carmen G. McLean to be an Associate Judge of the Superior Court of the District  
of Columbia  
Thursday July 19, 2018**

Do you think it is appropriate to withhold in MSPB opinions the identity of an employee who is found to have committed a prohibited personnel practice? If so, please explain the reasons you believe the identity should be withheld.

No. I understand that, while the Board may withhold the identity of an appellant or a respondent by granting anonymous "John Doe" status, such status is granted very rarely. A party seeking anonymity must overcome the presumption that parties' identities are public information. Anonymity is granted only in unusual circumstances, such as to prevent a clearly unwarranted invasion of a third party's privacy, to preserve the appellant's physical safety, or when the matters involved are of a highly sensitive or personal nature.

**Senator Claire McCaskill  
Post-Hearing Questions for the Record  
Submitted to Mr. Dennis Kirk**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,  
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,  
Andrew F. Maunz to be a Member of the Merit Systems Protection Board, and  
Carmen G. McLean to be an Associate Judge of the Superior Court of the District of  
Columbia  
Thursday July 19, 2018**

**Whistleblower Protections**

The MSPB is one of several entities -- including Inspectors General and the Office of Special Counsel (OSC) -- that play a role in protecting whistleblowers from retaliation, and ensuring that whistleblowers are made whole if they experience prohibited personnel practices

Congress has passed numerous laws to protect whistleblowers since the very founding of this country. Most recently, and most relevant to MSPB, are the Whistleblower Protection Enhancement Act (WPEA) and the recent enacted All Circuit Review Act. It is important to emphasize that Congress keeps passing laws and expanding protections because we believe whistleblowers are important and should be protected. Yet, sometimes the institutions charged with protecting whistleblowers do not heed this intent. We need to make sure that these institutions are operating on principles of transparency, accountability, and fairness.

Q. Under oath, will you commit that federal employees will continue to have access to all the avenues of appeal available to them if you are confirmed?

I can only commit to the avenues of appeal available to Federal employees at the MSPB, to the extent they exist under law, rule or regulation.

Q. What will you do to ensure that the MSPB fosters a reputation for being an institution that is fair to whistleblowers?

MSPB's job is to fairly, impartially and expeditiously adjudicate whistleblower claims consistent with both statutory provisions and controlling case law from Courts of competent jurisdiction. Without speaking for my possible future colleagues, I believe this will be a high priority for the Board once a quorum is restored.

Q. MSPB's significant case backlog, soon to reach 1,300 petitions for review, can lead to continuing injustice for whistleblowers. What will you do to address this backlog?

As I testified at the July 19, 2018 confirmation hearing, addressing the backlog will be my most important priority. During the nomination and confirmation process, I have

come to know and learn to respect the two individuals whom I hope will become my colleagues. I believe we will be able to work collegially to set priorities and begin to issue cases.

- Q. Do you believe that the Administrative Judges hearing cases have sufficient training in whistleblower protection laws to ensure that rulings are not contrary to the law? What will you do to ensure that all employees within MSPB have a proper understanding of whistleblower protections?

I believe in the importance of career development training and note that most attorneys have annual continuing legal education requirements. I do not have specific knowledge of what types of training MSPB employees, including administrative judges, have access to during their careers. But, if confirmed, I will work to ensure that administrative judges and all other MSPB employees have access to all of the training they need on whistleblower protections and all other topics.

We have seen troubling instances where there has been burden shifting onto the whistleblowers, where the law is clear that the agency bears the responsibility to show by clear and convincing evidence that there was no prohibited personnel practice.

- Q. Do you have concerns with burden shifting, and, if so, what should be done to address this? What additional efforts should be made to ensure that there is not improper burden shifting?

Without context of the particular situations in which burden shifting might be an issue, I cannot answer this question.

- Q. Burden shifting is a key issue in cases where certain employees, like auditors and investigators, are reporting concerns in the course of their duties. OSC has argued that MSPB has wrongly determined that these employees had a higher evidentiary burden than the law required. What are your views of this argument? Does MSPB need to look more closely at this issue?

If confirmed, the issues and concerns raised by the Office of Special Counsel are matters that could come before me in existing or future cases that I will adjudicate. As such, it would be inappropriate for me to comment on this now.

**Senator Gary Peters  
Post-Hearing Questions for the Record  
Submitted to Mr. Dennis Kirk**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,  
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,  
Andrew F. Maunz to be a Member of the Merit Systems Protection Board, and  
Carmen G. McLean to be an Associate Judge of the Superior Court of the District  
of Columbia  
Thursday July 19, 2018**

1. During this morning's hearing, you stated that you have not had the opportunity to review the proposed Modern Employment Reform, Improvement, and Transformation Act (MERIT Act), H.R. 599, which would significantly reduce the time it takes to fire a federal worker accused of poor performance or misconduct. The bill reduces the time for an employee to appeal firing decisions, or for the U.S. Merit Systems Protection Board (MSPB) to intervene on their behalf, and extends new employee probationary periods to two years. It would also allow agencies to avoid negotiated grievance procedures, reduce benefits of workers who are convicted of a felony and fired, and rescind bonuses or other cash awards deemed to be wrongly paid. On Tuesday, July 17, 2018, the nation's largest federal union, the American Federation of Government Employees, AFL-CIO (AFGE) signaled its strong opposition to The MERIT Act, arguing that the legislation would make it easier to fire federal employees and would give agencies alternative mechanisms for the punishment of federal workers. **After reviewing the legislation, do you believe it will support or undermine the due process system that provides federal workers with a meaningful opportunity to defend themselves when treated unfairly? How would the legislation impact the ability of the MSPB to review the appeals of employees who feel they have been wrongly terminated in a timely manner? Would eliminating or shortening processes for federal workers to challenge firing decisions of agencies, and empowering agencies to take-back bonuses or garnish benefits, improve federal employment practices?**

MSPB staff has reviewed the language of H.R. 599, the Modern Employment Reform, Improvement, and Transformation (MERIT) Act, as passed by the House Oversight Committee on July 17, 2018, and advised me that they do not believe the legislation addresses any issues of jurisdiction, procedure, substantive case law or any other matter concerning Board operations. MSPB staff does not currently believe that this legislation would negatively impact the Board's ability to review the appeals of employees who are the subject of an agency adverse action over which the Board has jurisdiction to adjudicate. As long as any statutory process is consistent with Constitutional due process, the length of the



appeals process and any other associated issues is a question of policy better addressed by policy makers in Congress. And it should be noted that whether any new process is consistent with Constitutional due process is an issue likely to be raised before the Board in the first instance. As such, it would be inappropriate for me to form an opinion in advance.

2. The House of Representatives Committee on Oversight and Government Reform recently voted to approve a five year reauthorization for the MSPB after more than a decade since its last authorization expired in 2007. Included in the reauthorization legislation was language that would allow MSPB members to issue summary judgments, reduce the burden of proof for agencies to justify adverse personnel actions from “a preponderance of the evidence” to “substantial evidence,” and it would require federal workers to pay a filing fee to appeal adverse personnel actions. The bill reduces the time to seven days for employees to respond to a notice of proposed discipline; require the agency to make a final decision within 15 days afterward; and allow only seven days, rather than 30, for the employee to appeal to the MSPB. **In your opinion, do you believe it is too hard currently to fire federal employees? Do you believe reducing the burden of proof to justify adverse agency decisions is appropriate? Should you be confirmed, how would you ensure that federal employees are treated fairly?**

This is a policy question not relevant to the Board’s jurisdiction or its operations. But in my personal opinion, no, it is not too hard currently to fire Federal employees. The process might be time consuming, but if current law, rules and regulations governing adverse actions are followed, a Federal employee may be separated for either performance issues or conduct. I will ensure that federal employees are treated fairly by adjudicating their cases based on the Constitution, Statutes, the Code of Federal Regulations, and the rules and procedures of the MSPB.

3. As noted in some of your questionnaires, the MSPB last published its research agenda in 2015, which expires in 2018. In order to develop the agenda, the previous MSPB took numerous steps to solicit input from stakeholders, including the heads of federal agencies, major federal employee unions, and professional associations with expertise in federal workforce issues. **What is your plan to develop an updated research agenda? What would you change from the outreach approach taken by the MSPB in 2015? Who would you consider to be important stakeholders in MSPB’s research agenda? How will you analyze the feedback from stakeholders in order to make decisions about research topics? How will you decide which topics to prioritize?**

The current research agenda was adopted by the previous Board in 2015 to last for a period of 3-5 years. I understand there are several research projects awaiting

review by a new quorum. It will be up to the new quorum to set a research agenda. I am not familiar with Board history on how research agendas previously have been adopted, including the most recent one in 2015. I anticipate that, if confirmed, we will reach out to stakeholders both inside the government, including Congress, employee representatives in both management and labor, and outside the government, including academia, and good government groups, to get suggestions for research which would lead to broadly beneficial studies. Not being currently familiar with this process, I do not know how stakeholder feedback is analyzed or how final decisions are ultimately made.

**Senator Heidi Heitkamp  
Post-Hearing Questions for the Record  
Submitted to Mr. Dennis Kirk**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,  
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,  
Andrew F. Maunz to be a Member of the Merit Systems Protection Board, and  
Carmen G. McLean to be an Associate Judge of the Superior Court of the District  
of Columbia  
Thursday July 19, 2018**

- What is an experience or situation from your life that shaped your outlook on the critical federal employee issues that MSPB considers and decides? Why did that situation impact you in the way that it did?

In June 1997, my niece Jacqueline wed Major Paul Syverson, III in the Vatican Chapel of Choirs. My brother Colonel Don Kirk, U.S. Army was stationed at the U.S. Embassy and we were treated graciously by the Embassy civil servants. A year later, Paul and Jackie had a son, Paul Syverson, IV.

A soldier in the 5<sup>th</sup> Special Forces, Paul was a hero many times over. After 9/11, in 2001, he was severely injured in the bombing of the Fort at Mosar El Shariff, Afghanistan, while he and his team tried to rescue Mike Spann, a civil servant trapped inside. Paul had several surgeries at Walter Reed Army Hospital, and the incredibly brilliant civilian and military doctors, nurses, and staff were amazing to him and our family while he was there. With their help, he recovered and returned to his service to our country.

In April 2004, Paul and Jackie had a daughter, Amy; and Paul got a short leave home to see his new child before he returned for the last month of his tour of duty.

In June 2004, Major Paul Syverson, III, was killed in Balad, Iraq, by enemy mortar fire. He is buried in Section 60, Arlington National Cemetery. He was given full military honors at the services by Acting Secretary of the Army, Les Brownlee; arranged by the wonderfully kind and gentle ANC staff.

That placed a sharp focus on my life. I again answered the call of duty to my country, and went into the Department of the Army Office of General Counsel. Service in the Office of General Counsel during two regional wars was a life-shaping series of phenomenal events due to the amazing men and women in civilian federal and military service in all the branches and areas where I was privileged to work and interact. Our work included: the Department of Defense-wide Quadrennial Defense Review;

overseeing Army-wide deployment of *Lean Six Sigma*; and the modernization teams of civilian and military folks deployed to reshape Army legal services.

These Army and Department of Defense folks fought from the Pentagon to keep safe and protect our fellow Americans in their everyday lives as citizens. They volunteered countless off-the-clock hours as they strove to excel and be inspirational. I was able to achieve results with their support. With my Defense Department and Army teams of public servants, we modernized the current military and civilian forces by shaping creative, innovative, and lasting enterprise operations; literally saving the Defense Department and the Army millions of dollars of taxpayer money.

For that service, I received decorations, medals, and a hefty cash award. In honor of civil servants, such as Major Paul Syverson, III, I donated the cash to the Secretary of the Army's Gift Fund, designated for the use of the 5<sup>th</sup> Special Forces Command. That Commander deployed it into the Morale, Welfare & Recreation funds at Ft. Campbell, and it funded such things as a base-wide picnic for families of soldiers stationed at the fort.

That is why I am thrilled to be called again to work with our federal civil servants; this time, in the merit systems protection functions of the MSPB.

- What role should previous MSPB decisions or other relevant precedents play in how an MSPB board member decides cases or makes decisions?

Precedent plays an important role in judicial and administrative decision-making. If confirmed, I will carefully consider all relevant precedents, including whether a previous MSPB decision was correct, and arguments raised by the parties in deciding cases that come before the Board.

- If you are confirmed and you come across a case where there is clear precedent, but, when you look at the case closely, you begin to question if that previous decision was decided correctly.
  - How should a MSPB board member go about determining when a precedent needs to be changed?

An adjudicator's job is to apply the law to a given set of facts unique to the case in question. If confirmed, I will carefully consider all relevant precedents and arguments about those precedents raised by the parties in deciding cases that come before the Board, and question precedent when it is appropriate and necessary to do so.

- What role does the federal workforce play in the United States, and what do the American people need from the federal workforce?
  - How should MSPB board members use their authority and decide cases to ensure those goals come to pass?

The question of what role the Federal workforce plays in the U.S. and the needs of the American people are policy questions better addressed by policy makers in Congress. However, to assist the policy makers in their considerations, the Board owes it to them and the American people to provide fair, timely and impartial decisions on matters brought to it for adjudication.

- What changes need to be made to MSPB, its jurisdiction or its authority?

I'm not currently aware of any needed changes to Board jurisdiction or its authority.

- Many federal employee and federal employee groups feel that recent Executive Orders from this administration on issues such as making it easier to let go of poor performing federal employees or curbing the use of official time are direct assaults on federal employees and their long-held civil service rights.

- What is your opinion of these executive orders?

While I have not reviewed these executive orders in great detail, opinions on their content is a policy question not within the Board's jurisdiction.

- How do you feel that these executive orders will impact your potential work at MSPB?

See response above.

- What are your plans to use your role on MSPB to protect the rights of federal employees?

The Board protects Constitutional and Title 5 due process rights of Federal employees challenging agency actions by fairly, timely and impartially adjudicating its case load.

- Do you feel that the May 25 Executive Order, which addressed how agencies should deal with poor-performing federal employees, can work in concert with the statutory protections that federal employees are provided?

As discussed above, this is a policy question not within the Board's jurisdiction.

- What is MSPB's role in determining how to balance the directives to agency heads in that executive order with the statutory protections which are the foundation of the civil service code?

The question whether there are any conflicts between provisions of Title 5 and the May 25, 2018 executive order might arise in cases that come before the Board. As such, it would be inappropriate for me to form an opinion at this point.

Additional questions below

Administrative Law Judges (ALJs) have unique statutory protections from unlawful removals. 5 U.S.C. §7521 generally states that an ALJ can only be removed after good cause to do so was established and determined by the MSPB on the record after opportunity for a hearing. The recent Executive Order that moved ALJ hiring from the competitive service to the excepted service does not impact the 5 U.S.C. §7521 protections.

- In your opinion, is it important to have specific protections against the unlawful removal of ALJs in federal statute?
  - Why or Why not?

Yes. It is important to have specific protections against the unlawful removal of administrative law judges in Federal statute. The protections contained in 5 U.S.C. § 7521 and elsewhere ensure that adverse actions against administrative law judges are taken solely for performance or conduct reasons and not in retaliation for decisions rendered against an agency.

- If confirmed, what steps would you take to examine a case where an agency claimed good cause to fire an ALJ to ensure the agency claim was correct?

If confirmed, I will consider all relevant legal authorities and arguments raised by the parties in cases before the Board, including any cases involving dismissal of an administrative law judge.

- In your opinion, does 5 USC §7521 require that MSPB determine if the good cause threshold to remove an ALJ has been met, or does it just require that MSPB determine only if there is sufficient evidence to prove an agency's determination of "good cause"?
  - Please explain the reasoning behind your answer.

If confirmed, I will consider all relevant legal authorities and arguments raised by the parties in cases before the Board, including arguments concerning 5 U.S.C. § 7521, which states that actions may be taken against administrative law judges "only for good cause established and determined by the" MSPB.

- In recently published news articles (<https://www.reuters.com/article/us-otc-dojmemo/in-confidential-memo-to-agency-gcs-doj-signals-aggressive-stand-on-firing-aljs->

idUSKBN1KD2BB) about Department of Justice guidance to agencies on how to navigate ALJ issues in the wake of the recent *Lucia v. SEC* Supreme Court decision, DOJ argued that MSPB should be suitably deferential to the determinations of agency heads when it comes to the removal of ALJs.

- What role should MSPB play in safeguarding the president's power to supervise the executive branch?

The MSPB's role is to apply the law in cases that come before it. If confirmed, I will decide cases within MSPB's jurisdiction fairly and in accordance with applicable law.

- How would you define "suitably deferential" in terms of MSPB's responsibilities to safeguard and protect federal employees from unlawful removals?

To my knowledge, "suitably deferential" is not a standard currently contained in Title 5, Board case law, or other binding precedent. To the extent the concept could arise in the context of Board consideration of a matter before the Board, it would be inappropriate for me to form an opinion prematurely.

- What role can MSPB play in ensuring that ALJs are not removed for any invidious reasons or to influence a particular outcome?

5 U.S.C. § 7521 states that an adverse action against an administrative law judge may be taken "only for good cause established and determined by the Merit Systems Protection Board." The Board can ensure this provision is enforced by fair, impartial and timely adjudication of any such actions.

- As mentioned earlier, the recent Executive Order on ALJs recently moved ALJs into the excepted service. That means ALJs will be excepted service employees, giving agencies greater flexibility to hire ALJs as they see fit. However, the ALJs will continue to have significant merit system protections against removal or other significant employment punishment without good cause?

- What challenges to a member of the MSPB are presented when federal employees are both excepted employees and have significant merit system protections?

I am not currently aware of any such challenges. Most excepted service Federal employees have had appeal rights to the Board since passage of the civil service due process amendments, P.L. No. 101-376 (Aug. 17, 1990).

- In your opinion, what responsibility do MSPB members have to ensure that ALJs follow agency policies, procedures or instructions?

The MSPB's role is to apply all applicable laws in cases coming before the Board, including cases involving adverse actions against administrative law judges, as discussed in 5 U.S.C. § 7521. In examining whether there is good cause, the MSPB has at times examined whether an administrative law judge has followed lawful agency policies, procedures, or instructions.



I, Dennis Dean Kirk, hereby state that I have read the foregoing Post-Hearing Questions for the Record and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

D. D. Kirk  
(Signature)

This 25<sup>th</sup> day of July, 2018

The Honorable Thomas M. Davis  
Statement in support of  
Dennis Dean Kirk,  
Nominee for Chairman and  
Member of the Merit System Protection Board (MSPB)

Chairman Lankford, Ranking Member Heitkamp, and distinguished members of the United States Senate Homeland Security and Government Affairs Committee's Subcommittee on Regulatory Affairs and Federal Management: I am Thomas M. Davis, former member of the U.S. House of Representatives and former Chair of the U.S. House Committee on Government Reform. I am currently a practicing attorney and Managing Director of Deloitte, LLP, in the District of Columbia.

I appreciate this opportunity to express my strong support on behalf of my great long-term friend, Dennis Dean Kirk, who has been nominated to serve as Chairman and Member of the Merit System Protection Board (MSPB).

In addition to his exceptional professional history, I believe that Dennis possesses the necessary character and temperament appropriate to serve in this adjudicatory and managerial capacity. Over the years, I have watched as people meet Dennis for the first time and are struck by his calm, contemplative, and thoughtful nature.

My family has been friends with Dennis and his family for over 30 years. I see his son Dean is here with us today. Dennis is a caring family man who is driven to excellence by his strong sense of duty, honor and compassion for others.

Dennis is currently the Senior Advisor to the Chief Information Officer, Office of Personnel Management. He is assisting in revolutionizing the employee data record system for all federal employees.

Before his OPM appointment, he was six years in private law practice, handling many complex employment law cases before federal agencies with the firm of Schmitz and Socarras, LLP, and its predecessor, Joseph E. Schmitz, LLP, as their outside contract partner for such matters.

From 2007 to 2012, he was the Associate General Counsel in the Department of the Army Office of General Counsel, as the AGC responsible for Strategic Integration and

Business Transformation across the Army. His accomplishments in the capacity of a highly qualified expert transformed the civilian and military core attorneys into a modernized force. Prior to that, Dennis was the Special Assistant to the General Counsel of the Army from 2005-2007.

Dennis was in private practice representing civilians such as local, state and federal employees, as well as military and business clients from 1977 to 2005. Dennis came to Washington, DC, in 1975, serving until 1977, as a Trial Attorney on the Bureau of Enforcement Director's staff of the Interstate Commerce Commission.

It was at that time that I met Dennis, and I thought so highly of him that I appointed him in 1979 as my Commissioner's Representative to the Fairfax County Consumer Protection Commission. Subsequent Commissioners, Democrats and Republicans, reappointed him and he has served for 36 years protecting Fairfax County consumers.

He is a graduate of Washburn Law School (J.D.), of Topeka, Kansas, of Northern Arizona University (B.S. in Police Science and Administration) in Flagstaff, and of Hutchinson Community Junior College of Kansas (A.A.).

Dennis has received many awards, including the Secretary of the Army's Decoration for Meritorious Civilian Service Medal, and the Decoration for Exceptional Civilian Service Medal (the Secretary of the Army's highest honor for civilian service).

I am confident that Dennis is ready to confront the challenges that lie ahead of him. I urge this committee to act promptly on his nomination.

I would have no hesitation in voting for Dennis Dean Kirk. I hope you will trust me and do the same.

Thanks again to Senator Lankford, Senator Heitkamp, and Members of the Subcommittee, for this opportunity to speak.

MSPB NOMINATION HEARING TESTIMONY  
JULIA AKINS CLARK  
MEMBER  
U.S. MERIT SYSTEMS PROTECTION BOARD  
SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS  
July 19, 2018

Chairman Lankford, Ranking Member Heitkamp and Members of the Committee:

Thank you for the opportunity to appear before you regarding my nomination to be a Member of the U.S. Merit Systems Protection Board. I am honored to be nominated to this important position and, if confirmed, pledge to serve with the highest degree of professionalism and integrity.

I am the daughter of career public servants, who taught me through their example the essential role career public servants play in the delivery of efficient, effective, and high-quality government services to the American people. I joined the federal civil service upon law school graduation, by accepting a position as an Honors Program Trial Attorney in the U.S. Department of Justice. Subsequently, I devoted my legal career to upholding the public's interest in maintaining a high-quality career civil service. For over twenty years, I represented civil servants' workplace interests, as a private labor organization attorney. For the last nine years, I have served as a senior official in two independent agencies—the Federal Labor Relations Authority and the Congressional Office of Compliance—administering federal laws designed to protect civil servants' workplace rights.

In my work as private attorney, I was privileged to represent the workplace interests of NASA scientists, engineers and technicians, Naval Shipyard engineers and technicians, including those with nuclear energy responsibilities, Army Corps of Engineers research scientists and emergency preparedness employees, Environmental Protection Agency scientists, Congressional Research Service experts, General Accountability Office analysts, Administrative Law and Immigration Judges and many others. I was privileged to rejoin the federal government in August 2009 as the General Counsel of the Federal Labor Relations Authority, where I was entrusted by the President and Senate with enforcement of labor-management relations provisions of the Civil Service Reform Act of 1978. Since January 2017, I have served as Deputy General Counsel of the Office of Compliance, the legislative branch's independent agency tasked with protecting legislative branch employees' workplace rights under the Congressional Accountability Act.

My experience as both a public servant and a private attorney has prepared me for the important adjudicatory responsibilities Congress has conferred upon the MSPB Member. I pledge my

unqualified commitment to protect the Merit System Principles and to promote a federal civil service free of Prohibited Personnel Practices by carrying out the MSPB Member's responsibilities fairly, impartially and in the public interest. I further wholeheartedly embrace the MSPB's stated vision—that by fulfilling the agency's statutory mission, the MSPB will promote a highly qualified, diverse federal workforce that is fairly and effectively managed, and provides the best possible government services to the American people.

I want to thank the Committee for expediting the consideration of my nomination in the interest of restoring the Board's quorum. I understand well the challenge facing the incoming Board who must adjudicate well over a thousand backlogged cases. When I assumed my responsibilities as FLRA General Counsel, a backlog of 200 unfair labor practice complaint cases and 800 appeals cases had accumulated due to extended vacancies in the General Counsel and Deputy General Counsel positions. Working with career staff, we developed and implemented a plan to address the backlog and managed to clear it within six months. I am confident that, if confirmed, the new Board will similarly develop a consensus plan, with assistance from MSPB staff, to address the MSPB's backlog as expeditiously as possible.

I would also like to thank the Committee staff, my fellow nominees and Acting MSPB Chairman Robbins for their professional and collegial approach to the preparations for this hearing. Further, I want to express my appreciation to my family, friends and work colleagues over the years for their guidance and support. Most especially, I want to thank the thousands of federal civil servants I have been privileged to meet over the course of my career. They are the foundation of my faith in the enduring value of the federal civil service system to the American people.

**REDACTED**

## BeHSGAC BIOGRAPHICAL QUESTIONS FOR EXECUTIVE NOMINEES

### 1. Basic Biographical Information

Please provide the following information.

<i>Position to Which You Have Been Nominated</i>	
Name of Position	Date of Nomination
Member, Merit Systems Protection Board	

<i>Current Legal Name</i>			
First Name	Middle Name	Last Name	Suffix
Julia ("Julie")	Akins	Clark	

<i>Addresses</i>					
Residential Address (do not include street address)			Office Address (include street address)		
			Street: 110 7 <sup>th</sup> Street, SE.		
City: Bethesda	State: MD	Zip: 20814	City: Washington	State: DC	Zip: 20540

<i>Other Names Used</i>						
First Name	Middle Name	Last Name	Suffix	Check Multiple Entries	Name Used From (Month/Year) (Check box if estimate)	Name Used To (Month/Year) (Check box if estimate)
Julia ("Julie")	LoRene	Akins		X	08/1956      Est Xci	06/1990      Est n

<i>Birth Year and Place</i>	
<i>Year of Birth (Do not include month and day.)</i>	<i>Place of Birth</i>
1956	Shawnee, OK

<i>Marital Status</i>					
Check All That Describe Your Current Situation:					
Never Married <input type="checkbox"/>	Married <input checked="" type="checkbox"/>	Separated <input type="checkbox"/>	Annulled <input type="checkbox"/>	Divorced <input type="checkbox"/>	Widowed <input type="checkbox"/>

<i>Spouse's Name (current spouse only)</i>			
<i>Spouse's First Name</i>	<i>Spouse's Middle Name</i>	<i>Spouse's Last Name</i>	<i>Spouse's Suffix</i>
Nicholas	W.	Clark	

<i>Spouse's Other Names Used (current spouse only)</i>						
<i>First Name</i>	<i>Middle Name</i>	<i>Last Name</i>	<i>Suffix</i>	<i>Check if Maiden Name</i>	<i>Name Used From (Month/Year) (Check box if estimate)</i>	<i>Name Used To (Month/Year) (Check box if estimate)</i>
NA	NA	NA			Est <input type="checkbox"/>	Est <input type="checkbox"/>

Children's Names (if over 18)			
First Name	Middle Name	Last Name	Suffix
Lisa	Nichole	Clark	

## 2. Education

List all post-secondary schools attended.

Name of School	Type of School (vocational/technical/trade school, college/university/military college, correspondence/distance/extension/online school)	Date Began School (month/year) (check box if estimate)	Date Ended School (month/year) (check box if estimate) (check "present" box if still in school)	Degree	Date Awarded
Oklahoma Baptist University	University	06/1974	08/1977	B.A. Pol. Science	08/1977
Washington College of Law (American University)	Law School	09/1977	05/1980	J.D.	05/1980



### 3. Employment

(A) List all of your employment activities, including unemployment and self-employment. If the employment activity was military duty, list separate employment activity periods to show each change of military duty station. Do not list employment before your 18th birthday unless to provide a minimum of two years of employment history.

Type of Employment (Active Military Duty Station, National Guard/Reserve, USPHS Commissioned Corps, Other Federal employment, State Government (Non- Federal Employment), Self- employment, Unemployment, Federal Contractor, Non- Government Employment (excluding self-employment), Other	Name of Your Employer/ Assigned Duty Station	Most Recent Position Title/Rank	Location (City and State only)	Date Employment Began (month/year) (check box if estimate)	Date Employment Ended (month/year) (check box if estimate) (check "present" box if still employed)
Non-government	Grub Steak	Food preparer	Shawnee, OK	Est. X 09/1974	Est. X 12/1975
Non-government	Oklahoma Baptist University	Desk Attendant	Shawnee, OK	Est. X 09/1976	Est. X 12/1976
Non-government	Holiday Inn	Waitress	Shawnee, OK	Est. X 12/1977	Est. X 05/1977
Non-federal	D. C. Superior Court	Investigator	Washingt on, D.C.	Est. X 03/1978	Est. X 07/1978
Non-government	Arnold & Porter	Law Clerk	Washingt on, D.C.	Est. X 10/1978	Est. X 05/1980 (except 05- 08/1979)
Federal	Federal Trade Commission	Law Clerk	Washingt on, D.C.	06/1979	06/1979
Federal	United States Department of Justice	Trial Attorney	Washingt on, D.C.	09/1980	06/1985
Non-government	Blumenfeld & Cohen	Associate	Washingt on, D.C.	Est. X 07/1983	Est. X 05/1987
Non-government	National Coalition for the Homeless	Counsel	Washingt on, D.C.	Est. X 06/1987	Est. X 08/1988
Non-government	International Federation of Professional and Technical Engineers	Counsel	Washingt on, D.C.	11/1988	05/2009
Federal Employment	Federal Labor Relations Authority	General Counsel	Washingt on, D.C.	08/2009	01/2017

Federal Employment	Congressional Office of Compliance	Deputy General Counsel	Washington, D.C.	01/2017	present
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(B) List any advisory, consultative, honorary or other part-time service or positions with federal, state, or local governments, not listed elsewhere.

Name of Government Entity	Name of Position	Date Service Began (month/year) (check box if estimate)	Date Service Ended (month/year) (check box if estimate) (check "present" box if still serving)
NA	NA	Est <input type="checkbox"/>	Est <input type="checkbox"/> Present <input type="checkbox"/>

#### 4. Potential Conflict of Interest

(A) Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

During the one-year period preceding my appointment as FLRA General Counsel, I was employed as an attorney by the International Federation of Professional and Technical Engineers (IFPTE), a labor organization that represents federal employees. IFPTE-affiliated organizations may currently be or could in the future be representing employees in cases before the MSPB, although I have no knowledge of this. It is also possible that the FLRA or employees of the FLRA may currently be or may become parties to cases before the MSPB, although I have no knowledge of this.

(B) Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any legislation or affecting the administration or execution of law or public policy, other than while in a federal government capacity.

None

#### 5. Honors and Awards

List all scholarships, fellowships, honorary degrees, civilian service citations, military medals, academic or professional honors, honorary society memberships and any other special recognition for outstanding service or achievement.

Robert S. Kerr Scholar in Public Affairs, Oklahoma Baptist University, 1974-1977

### 6. Memberships

List all memberships that you have held in professional, social, business, fraternal, scholarly, civic, or charitable organizations in the last 10 years. Unless relevant to your nomination, you do NOT need to include memberships in charitable organizations available to the public as a result of a tax deductible donation of \$1,000 or less, Parent-Teacher Associations or other organizations connected to schools attended by your children, athletic clubs or teams, automobile support organizations (such as AAA), discounts clubs (such as Groupon or Sam's Club), or affinity memberships/consumer clubs (such as frequent flyer memberships).

<u>Name of Organization</u>	<u>Dates of Your Membership</u> (You may approximate)	<u>Position(s) Held</u>
American Bar Association	Various periods 2011-Present	none
District of Columbia Bar Association	1980-Present	none
Edgemoor Citizens Association	1990-Present	social chair 2008-2010, Assistant Secretary 02/2013 to present
Edgemoor Club	2009-Present	Swimming committee member 01/2017 to present

### 7. Political Activity

(A) Have you ever been a candidate for or been elected or appointed to a political office?

<u>Name of Office</u>	<u>Elected/Appointed/Candidate Only</u>	<u>Year(s) Election Held or Appointment Made</u>	<u>Term of Service (if applicable)</u>
NA	NA	NA	NA

(B) List any offices held in or services rendered to a political party or election committee during the last ten years that you have not listed elsewhere.

<u>Name of Party/Election Committee</u>	<u>Office/Services Rendered</u>	<u>Responsibilities</u>	<u>Dates of Service</u>
NA	NA	NA	NA

(C) Itemize all individual political contributions of \$200 or more that you have made in the past five years to any individual, campaign organization, political party, political action committee, or similar entity. Please list each individual contribution and not the total amount contributed to the person or entity during the year.

I have made political contributions, but no single contribution was more than \$200. I have contributed more than \$200 to a single candidate in the aggregate. As I understand the question, these contributions are not responsive to this question.

<u>Name of Recipient</u>	<u>Amount</u>	<u>Year of Contribution</u>
NA	NA	NA
NA	NA	NA

## 8. Publications and Speeches

(A) List the titles, publishers and dates of books, articles, reports or other published materials that you have written, including articles published on the Internet. Please provide the Committee with copies of all listed publications. In lieu of hard copies, electronic copies can be provided via e-mail or other digital format.

<u>Title</u>	<u>Publisher</u>	<u>Date(s) of Publication</u>
White Collar Exemptions	ABA Section on Labor and Employment Law	September 2008
Pending Amendments to the Fair Labor Standards Act	ABA Fair Labor Standards Committee	February 1996 (I am unable to locate a copy of this paper)
Developments in NLRB Representation Cases: April 2005 through March 2006	AFL-CIO Lawyers Coordinating Committee	May 2006

NLRA Protected Concerted Activity in Cyber Space	Labor Law Exchange Volume 21	November 2003
Use of Electronic Mail in Union Organizing Campaigns	AFL-CIO Lawyers Coordinating Committee	May 2002

(B) List any formal speeches you have delivered during the last five years and provide the Committee with copies of those speeches relevant to the position for which you have been nominated. Include any testimony to Congress or any other legislative or administrative body. These items can be provided electronically via e-mail or other digital format.

Title/Topic	Place/Audience	Date(s) of Speech
Testimony (confirmation hearing)	Washington, D.C. Senate Homeland Security and Governmental Affairs Committee	April 29, 2014
Remarks	Society of Federal Labor and Employee Relations Professionals ("SFLERP"), Crystal City, VA	April 28, 2016

(C) List all speeches and testimony you have delivered in the past ten years, except for those the text of which you are providing to the Committee.

Title	Place/Audience	Date(s) of Speech
Role of Collective Bargaining in Protecting ALJ Qualified Judicial Independence	Washington, D.C. Federal Administrative Law Judges Conference	April 17, 2009
Testimony (confirmation hearing)	Washington, D.C. Senate Homeland Security and Governmental Affairs Committee	July 29, 2009
Remarks	American Federation of Government Employees, Reno, NV	August, 2009
Remarks	Society of Federal Labor and Employee Relations Professionals ("SFLERP"), Crystal City, VA	April 22, 2010

## 8. Criminal History

Since (and including) your 18<sup>th</sup> birthday, has any of the following happened?

- Have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you? (Exclude citations involving traffic infractions where the fine was less than \$300 and did not include alcohol or drugs.) No
- Have you been arrested by any police officer, sheriff, marshal or any other type of law enforcement official? No
- Have you been charged, convicted, or sentenced of a crime in any court? No

- Have you been or are you currently on probation or parole? No
- Are you currently on trial or awaiting a trial on criminal charges? No
- To your knowledge, have you ever been the subject or target of a federal, state or local criminal investigation? No

If the answer to any of the questions above is yes, please answer the questions below for each criminal event (citation, arrest, investigation, etc.). If the event was an investigation, where the question below asks for information about the offense, please offer information about the offense under investigation (if known). NA

- A) Date of offense:
- a. Is this an estimate (Yes/No):
- B) Description of the specific nature of the offense:
- C) Did the offense involve any of the following?
- 1) Domestic violence or a crime of violence (such as battery or assault) against your child, dependent, cohabitant, spouse, former spouse, or someone with whom you share a child in common: Yes / No
  - 2) Firearms or explosives: Yes / No
  - 3) Alcohol or drugs: Yes / No
- D) Location where the offense occurred (city, county, state, zip code, country):
- E) Were you arrested, summoned, cited or did you receive a ticket to appear as a result of this offense by any police officer, sheriff, marshal or any other type of law enforcement official: Yes / No
- 1) Name of the law enforcement agency that arrested/cited/summoned you:
  - 2) Location of the law enforcement agency (city, county, state, zip code, country):
- F) As a result of this offense were you charged, convicted, currently awaiting trial, and/or ordered to appear in court in a criminal proceeding against you: Yes / No
- 1) If yes, provide the name of the court and the location of the court (city, county, state, zip code, country):
  - 2) If yes, provide all the charges brought against you for this offense, and the outcome of each charged offense (such as found guilty, found not-guilty, charge dropped or "nolle pros," etc). If you were found guilty or pleaded guilty to a lesser offense, list separately both the original charge and the lesser offense:
  - 3) If no, provide explanation:
- G) Were you sentenced as a result of this offense: Yes / No
- H) Provide a description of the sentence:
- I) Were you sentenced to imprisonment for a term exceeding one year: Yes / No
- J) Were you incarcerated as a result of that sentence for not less than one year: Yes / No
- K) If the conviction resulted in imprisonment, provide the dates that you actually were incarcerated:

L) If conviction resulted in probation or parole, provide the dates of probation or parole:

M) Are you currently on trial, awaiting a trial, or awaiting sentencing on criminal charges for this offense. Yes / No

N) Provide explanation:

### 9. Civil Litigation and Administrative or Legislative Proceedings

(A) Since (and including) your 18th birthday, have you been a party to any public record civil court action or administrative or legislative proceeding of any kind that resulted in (1) a finding of wrongdoing against you, or (2) a settlement agreement for you, or some other person or entity, to make a payment to settle allegations against you, or for you to take, or refrain from taking, some action. Do NOT include small claims proceedings. No

<u>Date Claim/Suit Was Filed or Legislative Proceedings Began</u>	<u>Court Name</u>	<u>Name(s) of Principal Parties Involved in Action/Proceeding</u>	<u>Nature of Action/Proceeding</u>	<u>Results of Action/Proceeding</u>
N/A	N/A	N/A	N/A	N/A

(B) In addition to those listed above, have you or any business of which you were an officer, director or owner ever been involved as a party of interest in any administrative agency proceeding or civil litigation? No. Please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity. NA

<u>Date Claim/Suit Was Filed</u>	<u>Court Name</u>	<u>Name(s) of Principal Parties Involved in Action/Proceeding</u>	<u>Nature of Action/Proceeding</u>	<u>Results of Action/Proceeding</u>
NA	NA	NA	NA	NA

(C) For responses to the previous question, please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity. NA

### 10. Breach of Professional Ethics

(A) Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency,

professional association, disciplinary committee, or other professional group?  
Exclude cases and proceedings already listed. No

<u>Name of Agency/Association/ Committee/Group</u>	<u>Date Citation/Disciplinary Action/Complaint Issued/Initiated</u>	<u>Describe Citation/Disciplinary Action/Complaint</u>	<u>Results of Disciplinary Action/Complaint</u>
NA	NA	NA	NA

(B) Have you ever been fired from a job, quit a job after being told you would be fired, left a job by mutual agreement following charges or allegations of misconduct, left a job by mutual agreement following notice of unsatisfactory performance, or received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as violation of a security policy? No

#### 11. Tax Compliance

(This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

**REDACTED**



**REDACTED**

**13. Lobbying**

In the past ten years, have you registered as a lobbyist? If so, please indicate the state, federal, or local bodies with which you have registered (e.g., House, Senate, California Secretary of State); No

**14. Outside Positions**

X See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

For the preceding ten calendar years and the current calendar year, report any positions held, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. Exclude positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

<u>Name of Organization</u>	<u>Address of Organization</u>	<u>Type of Organization</u> (corporation, firm, partnership, other business enterprise, other non-profit organization, educational institution)	<u>Position Held</u>	<u>Position Held From</u> (month/year)	<u>Position Held To</u> (month/year)

#### 15. Agreements or Arrangements

X See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

As of the date of filing your OGE Form 278, report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment.

Provide information regarding any agreements or arrangements you have concerning (1) future employment; (2) a leave of absence during your period of Government service; (3) continuation of payments by a former employer other than the United States Government; and (4) continuing participation in an employee welfare or benefit plan maintained by a former employer other than United States Government retirement benefits.

<u>Status and Term of Any Agreement or Arrangement</u>	<u>Parties</u>	<u>Date</u> (month/year)

#### **16. Additional Financial Data**

All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

**REDACTED**

**REDACTED**

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**SIGNATURE AND DATE**

I hereby state that I have read the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

JACOR June 21, 2018

**REDACTED**

UNITED STATES OFFICE OF  
GOVERNMENT ETHICS



June 26, 2018

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security  
and Governmental Affairs  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Julia Akins Clark, who has been nominated by President Trump for the position of Member, Merit Systems Protection Board.

We have reviewed the report and have obtained advice from the agency concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is an ethics agreement outlining the actions that the nominee will undertake to avoid conflicts of interest. Unless a date for compliance is indicated in the ethics agreement, the nominee must fully comply within three months of confirmation with any action specified in the ethics agreement.

Based thereon, we believe that this nominee is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,  
**DAVID**  
**APOL**

Digitally signed by DAVID  
APOL  
Date: 2018.06.26 18:28:45  
-04'00'

David J. Apol  
Acting Director and General Counsel

Enclosures

**REDACTED**

★ ★ ★ ★

1201 NEW YORK AVE NW • SUITE 500 • WASHINGTON DC • 20005

May 23, 2018

Treyer Mason-Gale  
Alternate Designated Agency Ethics Official  
U.S. Merit Systems Protection Board  
1615 M St NW  
Washington, DC 20419

Dear Mr. Mason-Gale:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Member of the Merit Systems Protection Board.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

Upon confirmation, I will resign from my position as Assistant Secretary of the Edgemoor Citizens Association of Bethesda, Maryland. For a period of one year after my resignation, I will not participate personally and substantially in any particular matter involving specific parties in which I know the Edgemoor Citizens Association is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d).

My spouse is the General Counsel of the United Food and Commercial Workers International Union (UFCW), a position for which he receives a fixed annual salary. For as long as my spouse continues to work for UFCW, I will not participate personally and substantially in any particular matter that to my knowledge has a direct and predictable effect on my spouse's compensation or employment with UFCW, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1). I also will not participate personally and substantially in any particular matter involving specific parties in which I know UFCW is a party or represents a party, unless I am first authorized to participate, pursuant to 5 C.F.R. § 2635.502(d). In addition, my spouse has agreed not to communicate directly with the Merit Systems Protection Board on behalf of UFCW during my appointment to the position of Member.

If I have a managed account or otherwise use the services of an investment professional during my appointment, I will ensure that the account manager or investment professional obtains my prior approval on a case-by-case basis for the purchase of any assets other than cash, cash equivalents, investment funds that qualify for the exemption at 5 C.F.R. § 2640.201(a), obligations of the United States, or municipal bonds.

I understand that as an appointee I will be required to sign the Ethics Pledge (Exec. Order No. 13770) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this ethics agreement.

I will meet in person with you during the first week of my service in the position of Board Member in order to complete the initial ethics briefing required under 5 C.F.R. § 2638.305. Within 90 days of my confirmation, I will document my compliance with this ethics agreement by notifying you in writing when I have completed the steps described in this ethics agreement.

I have been advised that this ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

Sincerely,



Julia Akins Clark

**U.S. Senate Committee on Homeland Security and Governmental Affairs  
Pre-hearing Questionnaire  
For the Nomination of Julia Akins Clark to be  
Member, Merit Systems Protection Board**

**I. Nomination Process and Conflicts of Interest**

1. Did the President give you specific reasons why he nominated you to be a Member of the Merit Systems Protection Board (MSPB)?

No.

2. Were any conditions, expressed or implied, attached to your nomination? If so, please explain.

No.

3. Have you made any commitments with respect to the policies and principles you will attempt to implement as a Member of the MSPB? If so, what are they, and to whom were the commitments made?

No.

4. Are you aware of any business relationship, dealing, or financial transaction that could result in a possible conflict of interest for you or the appearance of a conflict of interest? If so, please explain what procedures you will use to recuse yourself or otherwise address the conflict. And if you will recuse yourself, explain how you will ensure your responsibilities are not affected by your recusal.

I am not aware of any such possible conflict, or appearance of a conflict of interest. I will seek advice from and strictly adhere to guidance provided by the MSPB's Designated Ethics Officer ("DAEO") regarding any recusal and processes to follow to ensure that my responsibilities are not affected by any recusal.

**II. Background of the Nominee**

5. What specific background and experience affirmatively qualify you to be a Member of MSPB?

For the past 9 years I have served as a senior official in an independent agency charged with investigating, making merit determinations and, in appropriate cases, enforcing federal laws prohibiting federal employers and labor organizations from committing unfair labor practices ("ULP"). Both my position as FLRA General Counsel and as



Office of Compliance (“OOC”) Deputy General Counsel required me to execute these duties fairly, impartially and consistent with applicable law.

6. What experience, if any, do you have in deciding cases, resolving disputes, or performing the other duties required in serving on the MSPB?

As FLRA General Counsel, I was responsible for merit determinations in ULP cases. In addition, the Office of the General Counsel (“OGC”) under my leadership developed extensive on-line information and educational materials and provided in-person training to labor organization and agency management representatives nationwide.

7. Please describe:

- a. Your leadership and management style.

My leadership and management style is to lead by example with respect to work ethic, mission-focus, and personal integrity. I begin work with a new team by developing an in-depth understanding of preexisting work processes and procedures, evaluating available resources and needs, and soliciting input from the team regarding ways to improve work processes and more efficiently deploy resources. I engage the team frequently to ensure that I am aware of and can proactively address workplace issues. If I believe adjustments in work processes, procedures, assignments etc. may be required, I discuss my concerns and ideas with the team to get their input before making a final decision. I do my best to treat each employee with dignity and respect and to hold them accountable for performing their assigned work consistent with clear and reasonable expectations.

- b. Your experience managing personnel.

As FLRA General Counsel, I was responsible for the supervision of the OGC staff, including at headquarters and regional offices.

- c. What is the largest number of people that have worked under you?

Approximately 70.

### **III. Role of a Member, MSPB**

8. The Civil Service Reform Act requires that individuals appointed to the MSPB “demonstrate[] [the] ability, background, training, or experience” necessary to “carry out functions of the Board.”<sup>1</sup> Please describe how your abilities, background, training, and experience qualify you for the position of a Member of the MSPB.

I received my initial on-the-job legal training as an Honors Program Trial Attorney at the United States Department of Justice. I subsequently represented the workplace interests

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<sup>1</sup> 5 U.S.C. § 1201.

of federal career civil service employees for more than twenty years. Since August 2009, I have served as the General Counsel and Deputy General Counsel in two independent agencies – the FLRA and the OOC, respectively. Both agencies are tasked with providing, *inter alia*, independent, fair and impartial investigative, prosecution, adjudication and dispute resolution services to federal agencies, labor organizations and covered employees.

9. In your opinion, what is the role of the MSPB? What is the role of members in carrying out the statutory objectives of the MSPB?

5 U.S.C. § 1204 sets forth MSPB's main responsibilities to (1) adjudicate matters within its jurisdiction; (2) conduct special studies relating to the civil service and to other merit systems in the executive branch; and (3) review significant rules and regulations of the Office of Personnel Management (OPM). MSPB is not authorized to develop or implement policy or programs. MSPB Members have no management role unless so delegated by the Chairman. Instead, a Member's role is to adjudicate matters within the MSPB's jurisdiction.

10. MSPB's mission is to "protect the Merit System Principles and promote an effective Federal workforce free of Prohibited Personnel Practices." How do you envision fulfilling MSPB's mission both day-to-day, and long-term?

I envision fulfilling the MSPB mission by making case decisions fairly, impartially, and consistent with applicable law. I believe written case decisions should provide clear guidance to employees and supervisors, thereby providing long term stability in agency employee relations.

11. What do you anticipate being the greatest challenge you would face as a Member of the MSPB, and how would you seek to prepare for and address those challenges?

The greatest challenge facing the MSPB is expeditiously deciding the backlog of 1,300 cases that have accumulated due to a lack of quorum. I will work collaboratively with the Chairman, Vice Chairman, and MSPB staff to develop an action plan to work the backlogged cases and decide them as expeditiously as possible.

12. What do you believe to be the top challenges facing the federal workforce today? What steps do you plan to take to address these challenges, if confirmed as a Member? Please explain.

This question calls for an assessment of federal personnel policy that is beyond the scope of the MSPB's mission.

13. Do you believe you will review and adjudicate cases that come before you with good judgment and impartiality? Please explain, citing examples of prior work or experience that could bear on your abilities, if applicable.

I am confident that I can review and adjudicate cases that come before the MSPB with good judgment and impartiality based on my experience deciding the merits of ULP cases as the FLRA General Counsel.

#### **IV. Policy Questions**

14. What role do you think alternative dispute resolution options, including the Mediation Appeals Program, should play in the MSPB adjudication and enforcement process?

The Mediation Appeals Program (MAP) began as a pilot program in two regional offices in 2002, expanded nationwide in 2005, and has grown since 2007. All MAP mediators are Board employees who mediate cases do so as a collateral duty after training and certification. MAP is a confidential process in which the administrative judge who is assigned to hear the case is not involved in the mediation, and both parties must agree to its use before a mediator will be appointed. Over the years, MAP has generally maintained about a 60% settlement rate, but even if a case does not settle in MAP, the mediation process can assist the parties to focus the adjudication process on matters that are genuinely in dispute when returned to the adjudicating AJ.

15. MSPB is statutorily responsible for conducting oversight of the Office of Personnel Management's significant actions. How will you coordinate with OPM to ensure that significant actions conform to the merit systems principles outlined in 5 U.S.C. § 2301?

As required by Title 5 of the U.S. Code, each MSPB Annual Report provides a summary and analysis of those OPM actions that MSPB considers most significant. Title 5 does not provide for any further MSPB coordination or engagement with OPM regarding a significant action. However, policymakers or OPM can independently act on MSPB's analysis. For example, MSPB's 2008 review of OPM significant action noted that OPM review of conversions of political appointees was limited to positions in the competitive service, and OPM subsequently expanded its review to include positions in the Title 5 excepted service.

16. MSPB previously highlighted the need to examine the prevalence and forms of reprisal for protected activity, particularly for whistleblowing.<sup>2</sup> Do you view reprisal for whistleblowing as a significant challenge facing the federal workforce? Why or why not?

I am not privy to agency data on the prevalence and forms of alleged whistleblowing reprisals. But whistleblowers need to be taken seriously and have their claims investigated by agencies and/or OSC and adjudicated by MSPB.

17. In your opinion, is the underutilization of probationary periods a critical issue? If confirmed as a Member of MSPB, what steps would you take to ensure that managers better utilize probationary periods?

The utilization of probationary periods for workforce competencies is an agency management or OPM policy issue and not within the jurisdiction of the MSPB. However, MSPB has conducted research on Federal agencies' use of probationary periods. For example, MSPB recently estimated that agencies take formal action on approximately one-half of one percent of new supervisors for failing supervisory probation.

18. How do you view the role of information technology at MSPB as it relates to both day-to-day business and the overall mission objectives to uphold merit systems principles?

MSPB's Strategic Plan highlights the importance of improving and maintaining information technology (IT) to support its mission. More specifically, MSPB is in the process of modernizing its core business applications (i.e., case management, document management, and document assembly) to achieve electronic adjudication and migrate its infrastructure to the cloud. MSPB is developing requirements for its new applications, and expects to complete this transition in FY 2020. MSPB's existing legacy business applications are nearing end-of-life.

MSPB implemented mandatory e-filing for agencies and attorney representatives in two regional offices in 2012. For the past two years, the Board's Denver Field Office has utilized 100% electronic case files. Agency-wide, in FY 2017, 61% of initial appeals and 82% of pleadings were filed electronically. Moving to 100% electronic adjudication will allow MSPB to process cases more efficiently and improve service to our customers. In addition, this supports MSPB's efforts to comply with Government-wide requirements for IT security and electronic records management, and reduces costs.

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<sup>2</sup> Merit Systems Protection Board, MSPB Research Agenda 2015-2018 (Feb. 2015), available at <https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=1140540&version=1145045&application=ACROBAT>.

19. What role do you think merit systems studies, published by MSPB, play in ensuring a competent and efficient federal workforce?

The prospective nature of merit system studies, in conjunction with MSPB's adjudication of individual appeals and its authority to review human resources (HR) regulations, enables MSPB to fulfill its role as guardian of Federal merit systems and ensure the workforce is managed in accordance with the merit system principles and free from prohibited personnel practices. As an independent agency with a bipartisan Board, MSPB's merit system studies provide an evidence-based, objective perspective on how the Federal workforce is being managed. MSPB's broad authority enables it to examine any civil service law, policy, or practice that materially affects the competency, efficiency, or integrity of the Federal workforce. Because MSPB reports are submitted directly to the President and Congress, the studies function serves as a check on management abuses, and also informs policy makers, supervisors and practitioners about potential improvements in the law and practice.

- a. What steps would you take to ensure that MSPB's external reports address critical federal workforce issues?

The members of the MSPB periodically set out a research agenda for issues to be addressed in reports. The last five-year research agenda was adopted in 2013, so the new Board members will have an opportunity to set a new research agenda.

- b. What, if any, coordination do you believe should occur between MSPB and OPM to address federal workforce issues raised by MSPB studies?

The Civil Service Reform Act gave MSPB and OPM distinct responsibilities. OPM's role is to execute, administer, and enforce personnel management rules and regulations and serve as the President's agent for HR management. MSPB, in contrast, provides independent oversight of the Federal Government's adherence to merit principles and freedom from prohibited personnel practices. In that capacity, it reviews how OPM regulations, policies, and actions affect the civil service and reports to Congress and the President. MSPB can share information about Federal workforce issues from its merit system studies and reviews with OPM. However, to preserve its oversight and adjudicatory independence, MSPB does not coordinate with OPM on formulating or implementing workforce policies and practices.

20. According to MSPB's Fiscal Year 2017 annual report, 22 percent of MSPB employees, including 25 percent of administrative judges, are eligible to retire in the next two years. What steps will you take to ensure that MSPB conducts its own succession planning, so that you are able to execute your statutory duties?

I understand that the present leadership of the Board has a continuity of operations (COOP) plan that addresses such issues. The new Chairman will have an opportunity to review and revise as he sees fit.

21. In March 2018, MSPB published an updated survey on sexual harassment in the federal workforce.<sup>3</sup> In this survey, 20.9 percent of women in the federal workforce and 8.7 percent of men experienced a type of sexual harassment in the two years preceding the survey.<sup>4</sup> Only eight percent of these employees believed corrective action was taken against the individual who committed the harassment, possibly resulting in employees not using agency procedures to report the harassment.<sup>5</sup> What do you believe is the role of MSPB in ensuring accountability against harassers in the federal workplace and in ensuring employees can report harassment without reprisal?

Ensuring accountability against workplace harassment belongs to individual departments and agencies or OPM. The Board adjudicates prohibited personnel practices, including cases in which claims of sexual harassment are raised.

22. What steps can MSPB take to improve federal supervisors' knowledge and intra-agency support regarding disciplinary and removal processes?

MSPB has no direct responsibility for intra-agency support regarding disciplinary and removal processes. MSPB provides information on these topics to supervisors and others involved in managing the Federal workforce, through publications, its website, and outreach.

23. Protecting whistleblower confidentiality is of the utmost importance to this Committee.

- a. During your career how have you addressed whistleblower complaints?

I strictly adhered to law and agency policy regarding whistleblower complaints and cooperated and instructed my subordinates to cooperate with any whistleblower investigation.

- b. How do you plan to implement policies within the MSPB to encourage employees to bring constructive suggestions forward without the fear of reprisal?

The MSPB website provides detailed information regarding the right of an individual to file a complaint under the Inspector General Act when the individual suspects that a member of the MSPB staff has committed fraud, waste, abuse, gross mismanagement or engaged in conduct that presents a substantial and specific danger to public health or safety involving MSPB programs or activities.

The MSPB website also contains notice of the agency's compliance with its responsibilities under the NoFEAR Act. The NoFEAR Act requires the agency to inform

<sup>3</sup> Merit Systems Protection Board, Update on Sexual Harassment in the Federal Workforce (Mar. 2018), available at <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1500639&version=1506232&application=ACROBAT>.

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Id.* at 8.

MSPB employees, former employees, and applicants for employment with the MSPB of the rights and protections available under Federal antidiscrimination and whistleblower protection laws.

All MSPB employees complete the NoFEAR training every two years. New employees are provided the training within two weeks of their start date.

- c. Do you commit without reservation to work to ensure that any whistleblower within MSPB does not face retaliation?

Yes

- d. Do you commit without reservation to take all appropriate action if notified about potential whistleblower retaliation?

Yes

#### **V. Relations with Congress**

24. Do you agree without reservation to comply with any request or summons to appear and testify before any duly constituted committee of Congress if you are confirmed?

Yes

25. Do you agree without reservation to make any subordinate official or employee available to appear and testify before, or provide information to, any duly constituted committee of Congress if you are confirmed?

Yes

26. Do you agree without reservation to comply fully, completely, and promptly to any request for documents, communications, or any other agency material or information from any duly constituted committee of the Congress if you are confirmed?

Yes

#### **VI. Assistance**

27. Are these answers your own? Have you consulted with MSPB or any other interested parties? If so, please indicate which entities.

I consulted with Acting MSPB Chairman, Mark Robbins.

**Majority Supplemental Pre-hearing Questionnaire  
For the Nomination of Julia Akins Clark to be  
Member, Merit Systems Protection Board**

1. You hired Dennis Walsh in 2009 to be your Deputy General Counsel, one of your first official actions as the General Counsel (GC) at the U. S. Federal Labor Relations Authority (FLRA). A November 9, 2015 IG Report (OIG 1-516) indicated that while serving as the Philadelphia RD for the National Labor Relations Board, and preceding that while serving at the FLRA, Mr. Walsh was engaged in improper fundraising activities for the Peggy Browning Fund, leading to charges of pro-Union bias. That conflict of interest led to a 30-day suspension from his duties. Were you aware of his activities with the Peggy Browning Fund?

I am not privy to this Report, however, based upon the above description I was not aware of the activities that led to Mr. Walsh's suspension.

2. During your tenure as General Counsel at the FLRA, you increased the number of SES from 3 to 8, making 11.6% of the OGC component SES. During the same time, 30.8% of the Office of General Counsel (OGC) components were classified as supervisors. Do you believe these figures support governmental efficiency? Would you make similar staffing decisions at MSPB? Would you commit to reducing the SES and managerial footprint of the MSPB?

I do not have access to data that would allow me to verify the question's representations regarding percentages of SES and supervisory employees. However, I would note that any such percentage would represent a snap shot in an FLRA rebuilding effort that was far from complete at the end of my tenure. I developed a succession and rebuilding plan, which permitted the OGC to restore the headquarters and regional offices to full functioning, after a 40% staff reduction, based on an essentially flat budget. The plan involved development of experienced, high performing internal candidates for promotion to supervisory positions and hiring new agents at the entry level. I did not increase the number of SES or supervisory positions. I filled vacant SES and working supervisor positions with highly qualified internal candidates. While proposed by me, this plan was endorsed by all FLRA PAS officials and resulted in dramatic improvements in OGC performance, including timely case processing and delivery of information and educational resources and in-person training.

The MSPB Chairman will be responsible for staffing decisions, however, once I fully understand the current MSPB staffing structure and resource needs, I will offer my opinions and advice to the extent the MSPB Chairman seeks it.



3. What restrictions may an agency reasonably place on the amount of official time union representatives may use in representing employees at the MSPB?

The agency may restrict official time use consistent with the Federal Service Labor Management Relations Statute ("FSLMRS"), 5 U.S.C. § 7101 et. seq. and the applicable collective bargaining agreement or other bi-lateral agreement, if any.

4. Should attorney fees be awarded to unions, when a union attorney represents a Federal employee before the MSPB but is also a salaried employee of the Union?

I am aware that the Board has developed a body of case law providing the legal framework for the circumstances under which a prevailing party is entitled to attorneys' fees. To the best of my knowledge, there is no legal distinction between a union attorney and one retained from the private sector.

5. Prior to serving as GC at the FLRA, you served as the GC for the IFPTE. Would you recuse yourself from any cases involving bargaining unit employees of IFPTE?

A recusal is legally required only if I was involved in the specific matter, or know an individual involved, to the extent that it might compromise my impartiality.

6. When serving as a General Counsel, did you allow OGC staff to enter into settlement negotiations with the agencies/unions prior to determining whether any violation of the statute had occurred? If your answer is yes then do you think allowing settlement negotiations to go forward before a determination is made to be premature and was your primary goal to settle a case or to determine whether the law had been violated?

During my time as General Counsel of the FLRA, the agency offered alternative dispute resolution (ADR) services to the parties. Utilization of the FLRA's ADR services was voluntary and offered the parties an opportunity to informally resolve their labor relations issues and concerns in a timely, economical and mutually beneficial fashion.

7. Do you believe when an FLRA agent enters into settlement negotiations with a responding party, the responding party would logically believe the Agent believed there was a violation of the law – otherwise wouldn't the FLRA dismiss the charge?

As stated above, the OGC's ADR program offered parties the opportunity to voluntarily accept FLRA agent-provided ADR services regarding ULP cases based upon full disclosure of pertinent, non-confidential information by the FLRA agent, including whether a merits decision had been made.

**Minority Supplemental Pre-hearing Questionnaire  
For the Nomination of Julia Akins Clark to be  
Member, Merit Systems Protection Board**

**I. Nomination Process and Conflicts of Interest**

1. Has the President or his staff asked you to sign a confidentiality or non-disclosure agreement?

No

2. Has the President or his staff asked you to pledge loyalty to the President or the Administration?

No

3. Have you ever represented a party in a matter before or involving the Merit Systems Protection Board (MSPB)? If so, please describe the matter(s) and the nature of the representation.

No.

**II. Background of Nominee**

4. Do you seek out dissenting views and how do you encourage constructive critical dialogue with subordinates?

My management style is to engage directly with employees, seek their views and suggestions, treat them with dignity and respect and build, day-by-day, a work atmosphere of trust and open communications.

5. Please give examples of times in your career when you disagreed with your superiors and aggressively advocated your position. Were you ever successful?

As General Counsel of a labor organization, I was responsible for providing legal guidance which from time-to-time was contrary to a course of action under consideration. In that position, I was fortunate to work for superiors who respected well-reasoned, well-researched, and well-supported legal guidance.

6. What would you consider your greatest successes as a leader?

The following accomplishments relate to my tenure as the FLRA General Counsel:

Improved timely Unfair Labor Practice (ULP) and Representation (REP) Case Processing: ULP timeliness improved from 50% to 70% of pending cases resolved within 120 day time target, and, as of FY 2016, 95% of all pending cases resolved within 240 days; REP timeliness

improved from 54% to 69% of election cases resolved within 120 day time target, and, as of FY 2016, 95% of all REP cases resolved within 360 days.

**Improved Quality ULP Case Processing:** Established a quality review program, including a regular audit of closed cases, to supplement on-going pending case supervision and appeals review of pending cases.

**FLRA Public Information and Training:** Directed development of comprehensive, web-based information resources including, Updated ULP and REP Case Handling Manuals and Case Law Outlines; and Guidance on high-impact issues (Information Requests, Meetings, Furloughs, Unit Definitions and Exclusions, Reorganizations, Electronic Notice Posting); established quarterly Basic and Advanced Statutory Training sessions offered to labor and management representatives through OGC regional offices.

**HR University On-Line Training:** Through an interagency agreement with the Department of Veterans Affairs and the Department of Defense, I led the team that developed and published free interactive, self-paced training modules posted on the Office of Personnel Management's on-line HR University ([www.hru.gov](http://www.hru.gov)), which addressed core labor relations topics including, Agency and Union ULP, Duty and Scope of Bargaining, Unit Definitions and Exclusions, Reorganizations).

**Support for OMB Reduce the Footprint Initiative:** Led interagency team, including the FLRA, Federal Mediation and Conciliation Service (FMCS), and the General Services Administration (GSA), in the development and delivery of joint labor-management training in support of the Office of Management and Budget's National Strategy for the Efficient Use of Real Property and Reduce the Footprint Policy, OMB Memorandum No. 2015-0.

**Improved FLRA Employee Satisfaction:** As measured by the Employee Viewpoint Survey (EVS), administered annually by the Partnership for Public Service, FLRA employee satisfaction improved from last place among small agencies in 2008 to consistently among the top seven small agencies in every subsequent year. As the top-level supervisor for over 50% of the FLRA workforce, my leadership contributed significantly to this improvement.

7. Do you have experience addressing instances of prohibited personnel practices (PPPs)? If so, please generally describe your experience.

I do not have relevant experience.

8. How will your experience help MSPB maintain MSPB's Merit System Principles (MSPs)?

For the past 9 years, I have served as a senior official in an independent agency charged with investigating, making merit determinations and, in appropriate cases, enforcing federal laws prohibiting federal employers and labor organizations from committing ULPs. Both my position as FLRA General Counsel and as OGC Deputy General Counsel required me to execute these duties fairly, impartially and consistent with applicable law. In addition, as a PAS manager of dozens of employees, I adhered to and required my subordinates to adhere to the MSPB's MSPs.

9. What lessons from your experience serving as General Counsel of the Federal Labor Relations Authority and Deputy General Counsel of the Congressional Office of Compliance will you bring with you to MSPB, if confirmed?

These experiences taught me the importance of developing and supporting career staff, including succession planning, as well as the criticality of devoting time and resources to employee engagement, consensus-building and creating a shared vision regarding mission accomplishment among political and career employees.

10. Please describe the extent to which your published writings on labor relations might inform your understanding of matters presented to MSPB.

My published writing on labor relations do not relate to matters presented to the MSPB.

### **III. Policy Questions**

11. Precedents, findings, recommendations and reviews of Office of Personnel Management (OPM) rules by the MSPB have potential to directly affect how employees are managed and how their appeals are decided. What role do you believe the MSPB should play in developing personnel policy?

None. Personnel policy development is the role of OPM, the administration and Congress, all of which have previously utilized data from Board studies and facts and situations from the Board's case law in the development of policy.

12. The MSPB has the statutory responsibility to conduct objective, non-partisan studies that assess and evaluate Federal merit systems policies, operations, and practices. These studies are typically government-wide in scope and ensure that the workforce is managed in accordance with MSPs and is free from PPPs. What role do you believe MSPB's data collection should play in supporting personnel policy?

As mentioned above, MSPB does not have a policy role concerning the Federal civil service. However, the data that is collected and analyzed in the Board's studies function is widely distributed and available to the policy makers, including OPM, the administration, Congress, and private sector/non-profit good government organizations.

13. MSPB has been without a quorum of Board members since January 8, 2017. The lack of a quorum contributes to delays in issuing final decisions in petitions for review (PFRs) and other cases filed at headquarters (HQ) and releasing reports of merit systems studies.
- a. The MSPB currently estimates that it will take months or longer to process the inventory of cases at HQ and to publish merit systems studies reports once new Board members are nominated and confirmed. Please describe how you will effectively and promptly address MSPB's current backlog.

I will work collaboratively with the Chairman, Vice Chairman, and MSPB staff to develop an action plan to work the backlogged cases and decide them as expeditiously as possible.

- b. Please describe how your previous work experience has prepared you to address the challenges in resolving MSPB's backlog.

When I was appointed FLRA General Counsel, the OGC had a backlog of 200 ULP complaint cases and 800 ULP appeal cases due to a prolonged vacancy in the General Counsel and Deputy General Counsel positions. I consulted with career staff who had developed a plan to clear the backlogged cases. Based on this recommendation I approved a plan, including time targets, which the FLRA OGC career staff executed.

- c. The MSPB Vice Chairman has voted on over 800 PFR cases which also await consideration by new Board members. If confirmed, please describe how you will work with your colleagues to consider cases awaiting decisions.

As stated above, I will work collaboratively with the Chairman, Vice Chairman, and MSPB staff to develop an action plan to work the backlogged cases and decide them as expeditiously as possible.

- d. Do you have experience with resolving backlogs such as the one faced by MSPB? If so, please describe your experience.

As stated above, when I was appointed FLRA General Counsel, the OGC had a backlog of 200 ULP complaint cases and 800 ULP appeal cases due to a prolonged vacancy in the General Counsel and Deputy General Counsel positions. I consulted with career staff who had developed a plan to clear the backlogged cases. Based on this recommendation I approved a plan, including time targets, which the FLRA OGC career staff executed.

- e. Have you sought advice from any current or former MSPB employees about how to best address the current backlog? If so, please describe your consultations.

I have been generally briefed by the current Acting Chairman on the size and scope of the backlog. Addressing it will be the top priority of the new Board and we will seek advice from the career and non-career staff on case processing prioritizations.

14. MSPB functions as an independent, third-party adjudicatory authority for employee appeals of adverse actions (e.g., removals, suspensions for more than 14 days, and furloughs) and retirement decisions.

- a. Please describe your experience in developing adjudicatory processes and procedures, issuing subpoenas, calling witnesses and enforcing decisions.
  - I have not had the opportunity to develop adjudicatory processes.

- In my position as a trial attorney at the Department of Justice, I assisted in the development and issuance of Civil Investigative Demands (a form of compulsory process). As private counsel, I also prepared and subpoenas for issuance in federal administrative proceedings.
- I called and examined witnesses in both civil investigations and a federal trial as a Justice Department trial attorney. As private counsel I called and examined witnesses in administrative and arbitration hearings.
- As FLRA General Counsel, I sought and received FLRA approval to seek enforcement in ULP cases. As OOC Deputy General Counsel, I have represented the OOC in seeking enforcement of OOC Board decisions in ULP cases.

b. Please describe how your previous work experience has prepared you to execute and supervise these actions at MSPB.

For the past 9 years I have served as a senior official in an independent agency charged with investigating, making merit determinations and, in appropriate cases, enforcing federal laws prohibiting federal employers and labor organizations from committing ULPs. Both my positions as FLRA General Counsel and as OOC Deputy General Counsel required me to execute these duties fairly, impartially and consistent with applicable law.

15. How should Board members seek to safeguard their independence?

The Board's independence is statutory, based in Title 5. Historically, the Board has maintained its independence and reputation by staying focused on its statutory responsibilities and not straying into policy discussions, which are beyond the Board's scope of authority.

16. MSPB was given the authority and responsibility to review the rules, regulations, and significant actions of OPM. Do you have any concerns about OPM's current rules, regulations or recent actions? If so, please describe those concerns.

I have not had the opportunity to review OPM's current rules, regulations or recent actions nor do I have access to sufficient information, which would allow me to develop an opinion in response to this question.

17. Do you believe MSPB has the resources it needs to meet current challenges? Please explain.

I do not have sufficient information to develop an opinion regarding the adequacy of the MSPB's resources.

18. How will you address the occurrence of PPPs with internal employees of MSPB?

I understand there are already internal processes and guidelines for employees who allege a PPP within the agency.

19. In some cases, complainants who may be better served by other government agencies such as the EEO or OSC seek assistance from the MSPB.

- a. How will you work to ensure that your staff effectively guides these complaints to the appropriate resources?

Processes are already in place to determine appropriate Board jurisdiction over issues brought to it.

- b. Will you collaborate with other government agencies to minimize duplication? If so, please describe how you will work to achieve this objective.

I understand MSPB has working relationships with OSC, EEOC, FLRA and OPM to address issues of jurisdiction where there may be overlap and possible duplication.

*Hatch Act*

20. What would you consider to be an appropriate penalty for a violation of the Hatch Act by a senior administration official?

The Board lacks jurisdiction over alleged Hatch Act violations by senior administration officials.

*Whistleblower protections*

21. Please describe any previous experience—in the public or private sector—with handling whistleblower complaints, and what steps you took to ensure those individuals did not face retaliation and that their claims were thoroughly investigated?

My sole experience occurred at the FLRA. I strictly adhered to law and agency policy regarding whistleblower complaints and cooperated and instructed my subordinates to cooperate with any whistleblower investigation.

22. OSC has filed an amicus brief opposing an MSPB decision that ruled against a whistleblower alleging retaliation because the MSPB said the whistleblower's disclosure was motivated by "interpersonal squabbling." Do you believe that the motive of the whistleblower should be considered when examining retaliation claims? Please explain.

It is my understanding that, under the whistleblowing statutes, while motive may be relevant to determining if an individual has a reasonable belief, a disclosure is not excluded from protection based on an individual's motive in making it. *See* 5 U.S.C. § 2302(f)(1) (codifying this rule in the WPEA).

23. OSC filed three amicus briefs in 2017 opposing the MSPB's alleged attempts to impose higher procedural burdens on whistleblowers. Do you believe that whistleblowers should be subjected to higher procedural burdens before their cases are considered by administrative judges? Please explain.

It is my understanding that these questions address issues that are presently pending before the Board for consideration and resolution in active cases. It would be inappropriate to address these whistleblowing issues now before I have had a chance to review the actual cases.

24. OSC has also filed amicus briefs opposing the application of higher evidentiary burdens on whistleblowers. OSC has written that this burden "runs directly counter to Congress's intent in passing the WPEA's enhanced protections for federal whistleblowers." Do you believe that any whistleblowers should be subjected to higher evidentiary burdens? Please explain.

It is my understanding that these questions address issues that are presently pending before the Board for consideration and resolution in active cases. It would be inappropriate to address these whistleblowing issues now before I have had a chance to review the actual cases.

25. If confirmed, how will you ensure that whistleblower complaints are properly investigated?

The Board lacks jurisdiction to investigate allegations of whistleblowing reprisal. That authority belongs to OSC. The Board adjudicates these claims.

#### **IV. Relations with Congress and the Public**

26. If confirmed, how will you make certain that you will respond in a timely manner to Member requests for information?

Yes, consistent with the law and all applicable rules and regulations.

27. If confirmed, do you agree without reservation to reply to any reasonable request for information from the Ranking Member of any duly constituted committee of the Congress?

Yes, consistent with the law and all applicable rules and regulations.

28. If confirmed, do you agree without reservation to reply to any reasonable request for information from members of Congress?

Yes, consistent with the law and all applicable rules and regulations.

29. If confirmed, do you commit to take all reasonable steps to ensure that you and your agency comply with deadlines established for requested information?

Yes, consistent with the law and all applicable rules and regulations.

30. If confirmed, do you commit to protect subordinate officials or employees from reprisal or retaliation for any testimony, briefings or communications with members of Congress?

Yes, consistent with the law and all applicable rules and regulations.



31. If confirmed, will you ensure that your staff will fully and promptly provide information and access to appropriate documents and officials in response to requests made by the Government Accountability Office (GAO) and the Congressional Research Service?

Yes, consistent with the law and all applicable rules and regulations.

32. If confirmed, will you agree to work with representatives from this Committee and the GAO to promptly implement recommendations for improving MSPB's operations and effectiveness?

Yes, consistent with the law and all applicable rules and regulations.

33. If confirmed, will you direct your staff to fully and promptly respond to Freedom of Information Act requests submitted by the American people?

Yes, consistent with the law and all applicable rules and regulations.

34. If confirmed, will you ensure that political appointees are not inappropriately involved in the review and release of Freedom of Information Act requests?

Yes, consistent with the law and all applicable rules and regulations.

**VI. Assistance**

35. Are these answers your own? Have you consulted with MSPB or any other interested parties? If so, please indicate which entities.

Yes. I consulted with Acting MSPB Chairman, Mark Robbins.

I, Julia Atkins Clark, hereby state that I have read the foregoing Pre-Hearing Questionnaire and Supplemental Questionnaires and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

  
(Signature)

This 11 day of July, 2018

**Chairman Ron Johnson  
Post-Hearing Questions for the Record  
Submitted to The Honorable Julia A. Clark**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,  
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,  
Andrew F. Maunz to be a Member of the Merit Systems Protection Board, and  
Carmen G. McLean to be an Associate Judge of the Superior Court of the District  
of Columbia  
Thursday July 19, 2018**

Do you think it is appropriate to withhold in MSPB opinions the identity of an employee who is found to have committed a prohibited personnel practice? If so, please explain the reasons you believe the identity should be withheld.

No. I understand that, while the Board may withhold the identity of an appellant or a respondent by granting anonymous "John Doe" status, such status is granted very rarely. A party seeking anonymity must overcome the presumption that parties' identities are public information. Anonymity is granted only in unusual circumstances, such as to prevent a clearly unwarranted invasion of a third party's privacy, to preserve the appellant's physical safety, or when the matters involved are of a highly sensitive or personal nature.

**Senator Claire McCaskill  
Post-Hearing Questions for the Record  
Submitted to The Honorable Julia A. Clark**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,  
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Thursday July 19, 2018**

**Whistleblower Protections**

The MSPB is one of several entities -- including Inspectors General and the Office of Special Counsel (OSC) -- that play a role in protecting whistleblowers from retaliation, and ensuring that whistleblowers are made whole if they experience prohibited personnel practices

Congress has passed numerous laws to protect whistleblowers since the very founding of this country. Most recently, and most relevant to MSPB, are the Whistleblower Protection Enhancement Act (WPEA) and the recent enacted All Circuit Review Act. It is important to emphasize that Congress keeps passing laws and expanding protections because we believe whistleblowers are important and should be protected. Yet, sometimes the institutions charged with protecting whistleblowers do not heed this intent. We need to make sure that these institutions are operating on principles of transparency, accountability, and fairness.

Q. Under oath, will you commit that federal employees will continue to have access to all the avenues of appeal available to them if you are confirmed?

I can only commit to the avenues of appeal available to Federal employees at the MSPB, to the extent they exist under law, rule or regulation.

Q. What will you do to ensure that the MSPB fosters a reputation for being an institution that is fair to whistleblowers?

MSPB's job is to fairly, impartially and expeditiously adjudicate whistleblower claims consistent with both statutory provisions and controlling case law from Courts of competent jurisdiction. Without speaking for my possible future colleagues, I believe this will be a high priority for the Board once a quorum is restored.

Q. MSPB's significant case backlog, soon to reach 1,300 petitions for review, can lead to continuing injustice for whistleblowers. What will you do to address this backlog?

As I testified at the July 19, 2018 confirmation hearing, addressing the backlog will be my most important priority. During the nomination and confirmation process, I have

come to know and learn to respect the two individuals whom I hope will become my colleagues. I believe we will be able to work collegially to set priorities and begin to issue cases.

- Q. Do you believe that the Administrative Judges hearing cases have sufficient training in whistleblower protection laws to ensure that rulings are not contrary to the law? What will you do to ensure that all employees within MSPB have a proper understanding of whistleblower protections?

I believe in the importance of career development training and note that most attorneys have annual continuing legal education requirements. I do not have specific knowledge of what types of training MSPB employees, including administrative judges, have access to during their careers. But, if confirmed, I will work to ensure that administrative judges and all other MSPB employees have access to all of the training they need on whistleblower protections and all other topics.

We have seen troubling instances where there has been burden shifting onto the whistleblowers, where the law is clear that the agency bears the responsibility to show by clear and convincing evidence that there was no prohibited personnel practice.

- Q. Do you have concerns with burden shifting, and, if so, what should be done to address this? What additional efforts should be made to ensure that there is not improper burden shifting?

Without context of the particular situations in which burden shifting might be an issue, I cannot answer this question.

- Q. Burden shifting is a key issue in cases where certain employees, like auditors and investigators, are reporting concerns in the course of their duties. OSC has argued that MSPB has wrongly determined that these employees had a higher evidentiary burden than the law required. What are your views of this argument? Does MSPB need to look more closely at this issue?

If confirmed, the issues and concerns raised by the Office of Special Counsel are matters that could come before me in existing or future cases that I will adjudicate. As such, it would be inappropriate for me to comment on this now.

**Senator James Lankford**  
**Post-Hearing Questions for the Record**  
**Submitted to the Honorable Julia A. Clark**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,  
 The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,  
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 of Columbia  
 Thursday July 19, 2018**

1. While you were General Counsel of the Federal Labor Relations Authority (FLRA) what was your approved protocol when, after investigation of an unfair labor practice charge, the FLRA would find no merit to the charge? Would the charge be dismissed or would the charging party be offered an opportunity to withdraw the charge?

The protocol I followed for handling unfair labor practice charges, which, after investigation, were determined by the FLRA Regional Director to lack merit can be found in the FLRA's Unfair Labor Practice Case Handling Manual. That Manual implemented FLRA regulations with respect to withdrawal of unfair labor practice charges (*see* 5 CFR § 2423.11(a)). The Manual is publicly available through the FLRA website at:

[https://www.flra.gov/system/files/webfm/OGC/Manuals/ULP\\_Case\\_Handling\\_Manual/ULP%20Case%20Handling%20Manual%20july%202016.pdf](https://www.flra.gov/system/files/webfm/OGC/Manuals/ULP_Case_Handling_Manual/ULP%20Case%20Handling%20Manual%20july%202016.pdf). As the FLRA website states, this is the Manual that FLRA agents follow when processing unfair labor practice cases. It describes the procedures for handling and investigating unfair labor practice charges, including those, which, after investigation, are found to lack merit. The Unfair Labor Practice Case Handling Manual does allow agents, under appropriate circumstances, to offer the charging party an opportunity to withdraw an unfair labor practice charge that lacks merit. The withdrawal-of-charge protocol has been in effect since the FLRA commenced operations in 1978.

- a. If the protocol allowed for the opportunity for the charging party to withdraw the charge then how would these discussions take place? By letter, by telephone, by e-mail or other electronic forms of communication?

The Unfair Labor Practice Case Handling Manual provides that this communication can include oral discussions (in-person or by telephone) but must always include a written confirmation, which could be transmitted electronically as well as by U.S. mail.

- b. Would the charge party be a party to those discussions or would the conversation solely be conducted between the charging party and the FLRA?

An agent's communication with the charging and charged parties—including those related to withdrawal of charges—would typically be conducted separately. This is because the agent is performing delegated investigatory responsibilities pursuant to 5 U.S.C. § 7104(f)(2)(A) to determine whether to prosecute an unfair labor practice pursuant to 5 U.S.C. § 7104(f)(2)(B). As such, the agent must treat as confidential certain investigatory and deliberative information, unless and until an enforcement decision is made.

- c. If the charging party is offered a “side deal” to withdraw the charge to avoid receiving a negative decision, what affect do you think that has on the appearance of impartiality of the FLRA?

Under the protocol set forth in the above-cited Unfair Labor Practice Case Handling Manual, charging parties were not offered a “side deal” but were informed that their charge would be dismissed absent withdrawal and given a reasonable opportunity to withdraw. This long-standing protocol is available to the public. Consequently, the logical inference to be drawn from a post-investigation withdrawal is that the FLRA Regional Director determined that the charge lacked merit. I retained this long-standing protocol, because, in my professional opinion and experience, it served to expeditiously resolve unfair labor practice charges and to support effective and efficient labor-management relations in the federal service.

2. As a Member of the Merit Systems Protection Board, would you find such ex parte conversation(s) with one side or the other to be appropriate?

The roles of the General Counsel at FLRA and a Member of the MSPB are completely different. The Office of General Counsel at FLRA has investigation and prosecution responsibilities. The MSPB adjudicates matters before it. As impartial adjudicators, ex parte communications with parties to the specific matter before the Board are allowed only in limited circumstances. Title 5 does provide that any single member of the Board may seek advisory opinions from OPM. *See* 5 U.S.C. 1204(e). And the Board has in the past solicited amicus briefs from non-parties on issues of wider significance.

In addition, at both the administrative judge and Board levels, MSPB prohibits oral and written ex parte communications on the merits of matters before it between decision-making officials of the Board and an interested party to a proceeding. *See* 5 C.F.R. 1201.102. Ex parte communications must be made a matter of record, the other party must be provided a chance to respond, and sanctions appropriate to the situation

may also be imposed. The parties may waive the rule against ex parte communications to allow an administrative judge to discuss settlement outside the presence of the other party.

If confirmed to be a MSPB Member, I would adhere strictly to these prohibitions and restrictions on ex parte communications.



**Senator Gary Peters  
Post-Hearing Questions for the Record  
Submitted to The Honorable Julia A. Clark**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,  
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,  
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1. During this morning's hearing, you stated that you have not had the opportunity to review the proposed Modern Employment Reform, Improvement, and Transformation Act (MERIT Act), H.R. 599, which would significantly reduce the time it takes to fire a federal worker accused of poor performance or misconduct. The bill reduces the time for an employee to appeal firing decisions, or for the U.S. Merit Systems Protection Board (MSPB) to intervene on their behalf, and extends new employee probationary periods to two years. It would also allow agencies to avoid negotiated grievance procedures, reduce benefits of workers who are convicted of a felony and fired, and rescind bonuses or other cash awards deemed to be wrongly paid. On Tuesday, July 17, 2018, the nation's largest federal union, the American Federation of Government Employees, AFL-CIO (AFGE) signaled its strong opposition to The MERIT Act, arguing that the legislation would make it easier to fire federal employees and would give agencies alternative mechanisms for the punishment of federal workers. **After reviewing the legislation, do you believe it will support or undermine the due process system that provides federal workers with a meaningful opportunity to defend themselves when treated unfairly? How would the legislation impact the ability of the MSPB to review the appeals of employees who feel they have been wrongly terminated in a timely manner? Would eliminating or shortening processes for federal workers to challenge firing decisions of agencies, and empowering agencies to take-back bonuses or garnish benefits, improve federal employment practices?**

I am informed that MSPB staff has reviewed the language of H.R. 599, the Modern Employment Reform, Improvement, and Transformation (MERIT) Act, as passed by the House Oversight Committee on July 17, 2018, and advised me that they do not believe the legislation addresses any issues of jurisdiction, procedure, substantive case law or any other matter concerning Board operations. MSPB staff does not currently believe that this legislation would negatively impact the Board's operational ability to review the appeals of employees who are the subject of an agency adverse action over which the Board has jurisdiction to adjudicate. As long as any statutory process is consistent with Constitutional due

process, the length of the appeals process and any other associated issues is a question of policy better addressed by policy makers in Congress. And it should be noted that whether any new process is consistent with Constitutional due process is an issue likely to be raised before the Board in the first instance. As such, it would be inappropriate for me to form an opinion on the Constitutional question in advance.

As I stated in my responses to the Committee's initial policy questions, I commit to respond to Congressional inquiries, if confirmed. However, I presently do not have access to information or data on which this proposed legislation is based and believe it would be inappropriate and ill-advised to offer an opinion at this time. I simply wish to reiterate my response to this question as it was posed during the hearing. Based on my decades of experience as both an employee representative and federal manager, current law and policy has, in my professional opinion, allowed me to fully represent not only the employees' interest but also the federal agency's and the public's interest in a merit-based civil service system.

2. The House of Representatives Committee on Oversight and Government Reform recently voted to approve a five year reauthorization for the MSPB after more than a decade since its last authorization expired in 2007. Included in the reauthorization legislation was language that would allow MSPB members to issue summary judgments, reduce the burden of proof for agencies to justify adverse personnel actions from "a preponderance of the evidence" to "substantial evidence," and it would require federal workers to pay a filing fee to appeal adverse personnel actions. The bill reduces the time to seven days for employees to respond to a notice of proposed discipline; require the agency to make a final decision within 15 days afterward; and allow only seven days, rather than 30, for the employee to appeal to the MSPB. **In your opinion, do you believe it is too hard currently to fire federal employees? Do you believe reducing the burden of proof to justify adverse agency decisions is appropriate? Should you be confirmed, how would you ensure that federal employees are treated fairly?**

This is a policy question not relevant to the Board's jurisdiction or its operations. But in my personal opinion, no, it is not too hard currently to fire Federal employees. The process requires an appropriate investment of time and resources but if current law, rules and regulations governing adverse actions are followed, a Federal employee can be lawfully and efficiently separated for either performance issues or conduct, consistent with federal agencies' and the public's interest in ensuring that removal actions are taken consistent with merit system principles. As stated in response to the previous question, in my professional opinion, current law and policy allows federal employees and federal agencies to fully and appropriately represent both their interests and the public's interest in a

merit-based civil service system. Should I be confirmed, I will ensure that federal employees are treated fairly by adjudicating cases that come before the Board in a fair, impartial and expeditious manner consistent with the law as written and binding precedent.

3. As noted in some of your questionnaires, the MSPB last published its research agenda in 2015, which expires in 2018. In order to develop the agenda, the previous MSPB took numerous steps to solicit input from stakeholders, including the heads of federal agencies, major federal employee unions, and professional associations with expertise in federal workforce issues. **What is your plan to develop an updated research agenda? What would you change from the outreach approach taken by the MSPB in 2015? Who would you consider to be important stakeholders in MSPB's research agenda? How will you analyze the feedback from stakeholders in order to make decisions about research topics? How will you decide which topics to prioritize?**

The current research agenda was adopted by the previous Board in 2015 to last for a period of 3-5 years. I understand there are several research projects awaiting review by a new quorum. It will be up to the new quorum to set a research agenda. I am not familiar with Board history on how research agendas previously have been adopted, including the most recent one in 2015. I anticipate that, if confirmed, we will reach out to stakeholders both inside the government, including Congress, employee representatives in both management and labor, and outside the government, including academia, and good government groups, to get suggestions for research which would lead to broadly beneficial studies. Not being currently familiar with this process, I do not know how stakeholder feedback is analyzed or how final decisions are ultimately made.

**Senator Heidi Heitkamp  
Post-Hearing Questions for the Record  
Submitted to The Honorable Julia A. Clark**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,  
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,  
Andrew F. Maunz to be a Member of the Merit Systems Protection Board, and  
Carmen G. McLean to be an Associate Judge of the Superior Court of the District  
of Columbia  
Thursday July 19, 2018**

- What is an experience or situation from your life that shaped your outlook on the critical federal employee issues that MSPB considers and decides? Why did that situation impact you in the way that it did?

As a labor organization attorney, I assisted a local affiliate in representing bargaining-unit employees during a reduction in force at a naval shipyard. This experience shaped my outlook on federal employee merit system issues because I was able to witness the application of merit system principles to a large-scale personnel action. Neither the labor organization nor the shipyard command had the power or authority to alter the reduction-in-force decision. Nevertheless, labor and management worked collaboratively to apply the federal merit system law, rules and regulations to ensure that once the reduction in force was completed, employee retention was fully compliant with merit system principles. This process required diligent efforts by both labor and management representatives and employees to ensure that the retention register, on which the reduction in force-based personnel actions were taken, accurately reflected each employee's retention status. While there were a few disputes that could not be resolved in a bi-lateral manner, nearly all issues were resolved through open dialogue based upon merit system principles. This experience allowed me to witness firsthand the public benefit of ensuring that federal personnel actions are based strictly on merit system law, rule and regulation.

- What role should previous MSPB decisions or other relevant precedents play in how an MSPB board member decides cases or makes decisions?

Precedent plays an important role in judicial and administrative decision-making. If confirmed, I will carefully consider all relevant precedents, including whether a previous MSPB decision was correct, and arguments raised by the parties in deciding cases that come before the Board.

- If you are confirmed and you come across a case where there is clear precedent, but, when you look at the case closely, you begin to question if that previous decision was decided correctly.

- How should a MSPB board member go about determining when a precedent needs to be changed?

An adjudicator's job is to apply the law to a given set of facts unique to the case in question. If confirmed, I will carefully consider all relevant precedents and arguments about those precedents raised by the parties in deciding cases that come before the Board and question precedent when it is appropriate and necessary to do so.

- What role does the federal workforce play in the United States, and what do the American people need from the federal workforce?

- How should MSPB board members use their authority and decide cases to ensure those goals come to pass?

The question of what role the Federal workforce plays in the U.S. and the needs of the American people are policy questions better addressed by policy makers in Congress. However, to assist the policy makers in their considerations, the Board owes it to them and the American people to provide fair, timely and impartial decisions on matters brought to it for adjudication.

- What changes need to be made to MSPB, its jurisdiction or its authority?

I'm not currently aware of any needed changes to Board jurisdiction or authority.

- Many federal employee and federal employee groups feel that recent Executive Orders from this administration on issues such as making it easier to let go of poor performing federal employees or curbing the use of official time are direct assaults on federal employees and their long-held civil service rights.

- What is your opinion of these executive orders?

While I have not reviewed these executive orders in great detail, opinions on their content is a policy question not within the Board's jurisdiction.

- How do you feel that these executive orders will impact your potential work at MSPB?

See response above.

- What are your plans to use your role on MSPB to protect the rights of federal employees?

The Board protects Constitutional and Title 5 due process rights of Federal employees challenging agency actions by fairly, timely and impartially adjudicating its case load.

- Do you feel that the May 25 Executive Order, which addressed how agencies should deal with poor-performing federal employees, can work in concert with the statutory protections that federal employees are provided?

As discussed above, this is a policy question not within the Board's jurisdiction.

- What is MSPB's role in determining how to balance the directives to agency heads in that executive order with the statutory protections which are the foundation of the civil service code?

The question whether there are any conflicts between provisions of Title 5 and the May 25, 2018 executive order might arise in cases that come before the Board. As such, it would be inappropriate for me to form an opinion at this point.

#### Additional questions below

Administrative Law Judges (ALJs) have unique statutory protections from unlawful removals. 5 U.S.C. §7521 generally states that an ALJ can only be removed after good cause to do so was established and determined by the MSPB on the record after opportunity for a hearing. The recent Executive Order that moved ALJ hiring from the competitive service to the excepted service does not impact the 5 U.S.C. §7521 protections.

- In your opinion, is it important to have specific protections against the unlawful removal of ALJs in federal statute?
  - Why or Why not?

Yes. It is important to have specific protections against the unlawful removal of administrative law judges in Federal statute. The protections contained in 5 U.S.C. § 7521 and elsewhere ensure that adverse actions against administrative law judges are taken solely for performance or conduct reasons and not in retaliation for decisions rendered against an agency.

- If confirmed, what steps would you take to examine a case where an agency claimed good cause to fire an ALJ to ensure the agency claim was correct?

If confirmed, I will consider all relevant legal authorities and arguments raised by the parties in cases before the Board, including any cases involving dismissal of an administrative law judge.

- In your opinion, does 5 USC §7521 require that MSPB determine if the good cause threshold to remove an ALJ has been met, or does it just require that MSPB determine only if there is sufficient evidence to prove an agency's determination of "good cause"?
  - Please explain the reasoning behind your answer.

If confirmed, I will consider all relevant legal authorities and arguments raised by the parties in cases before the Board, including arguments concerning 5 U.S.C. § 7521, which states that actions may be taken against administrative law judges "only for good cause established and determined by the" MSPB.

- In recently published news articles (<https://www.reuters.com/article/us-otc-dojmemo/in-confidential-memo-to-agency-gcs-doj-signals-aggressive-stand-on-firing-aljs-idUSKBN1KD2BB>) about Department of Justice guidance to agencies on how to navigate ALJ issues in the wake of the recent *Lucia v. SEC* Supreme Court decision, DOJ argued that MSPB should be suitably deferential to the determinations of agency heads when it comes to the removal of ALJs.

- What role should MSPB play in safeguarding the president's power to supervise the executive branch?

The MSPB's role is to apply the law in cases that come before it. If confirmed, I will decide cases within MSPB's jurisdiction fairly and in accordance with applicable law.

- How would you define "suitably deferential" in terms of MSPB's responsibilities to safeguard and protect federal employees from unlawful removals?

To my knowledge, "suitably deferential" is not a standard currently contained in Title 5, Board case law, or other binding precedent. To the extent the concept could arise in the context of Board consideration of a matter before the Board, it would be inappropriate for me to form an opinion prematurely.

- What role can MSPB play in ensuring that ALJs are not removed for any invidious reasons or to influence a particular outcome?

5 U.S.C. § 7521 states that an adverse action against an administrative law judge may be taken "only for good cause established and determined by the Merit Systems Protection Board." The Board can ensure this provision is enforced by fair, impartial and timely adjudication of any such actions.

- As mentioned earlier, the recent Executive Order on ALJs recently moved ALJs into the excepted service. That means ALJs will be excepted service employees, giving agencies greater flexibility to hire ALJs as they see fit. However, the ALJs will continue to have

significant merit system protections against removal or other significant employment punishment without good cause?

- What challenges to a member of the MSPB are presented when federal employees are both excepted employees and have significant merit system protections?

I am not currently aware of any such challenges. Most excepted service Federal employees have had appeal rights to the Board since passage of the civil service due process amendments, P.L. No. 101-376 (Aug. 17, 1990).

- In your opinion, what responsibility do MSPB members have to ensure that ALJs follow agency policies, procedures or instructions?

The MSPB's role is to apply all applicable laws in cases coming before the Board, including cases involving adverse actions against administrative law judges, as discussed in 5 U.S.C. § 7521. In examining whether there is good cause, the MSPB has at times examined whether an administrative law judge has followed lawful agency policies, procedures, or instructions.



I, Julia Akins Clark, hereby state that I have read the foregoing PostHearing Questions for the Record and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

JA Clark  
(Signature)

This 26 day of July, 2018



July 11, 2018

The Honorable Ron Johnson  
Chair, Senate Committee on Homeland Security and Governmental Affairs  
U.S. Senate  
Washington, DC 20510

Dear Senator Johnson:

As National President of the National Treasury Employees Union, I represent over 150,000 federal employees in 32 agencies. I am writing to give unqualified support for the nomination of Julia Clark to the Merit Systems Protection Board (MSPB).

Ms. Clark has been involved with federal employee organizations since 1988. She knows every aspect of federal employee rights and responsibilities. In her most recent position as General Counsel of the Federal Labor Relations Authority, she proved herself a capable and innovative leader. For instance, under Ms. Clark's command, the timeliness and quality of processing representational cases improved dramatically. Early intervention in unfair labor practice charges and negotiability disputes was also expanded and invigorated, with the result that many disputes were resolved short of formal litigation. In addition, she advanced labor-management relations in the federal government by implementing nationwide training sessions and making guidance materials readily available to the federal sector labor-management community. In her work with the International Federation of Professional and Technical Engineers, she acquired expertise in federal personnel law and the statutes directly impacting the MSPB, including chapters governing whistleblower protections, prohibited personnel practices, adverse actions and appeals.

I believe Ms. Clark will be an invaluable asset to the MSPB, providing a keen intellect, a judicial temperament, and expertise in federal personnel-management issues. It is also well past time to have a functioning MSPB. I urge you to advance her nomination forward.

Sincerely,

A handwritten signature in black ink that reads "Anthony M. Reardon". The signature is fluid and cursive.

Anthony M. Reardon  
National President

cc: The Honorable Claire McCaskill  
The Honorable James Lankford  
The Honorable Heidi Heitkamp

MSPB NOMINATION HEARING TESTIMONY

ANDREW F. MAUNZ  
MEMBER (TO BE DESIGNATED VICE CHAIRMAN)  
U.S. MERIT SYSTEMS PROTECTION BOARD

SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS  
July 19, 2018

Chairman Lankford, Ranking Member Heitkamp, and the rest of the members of the Committee and its staff:

I would like to thank you for having me here today. I would also like to thank President Trump for nominating me to this position. To my wife Kira, our two daughters, my parents and the rest of my family, I would like to thank you for your love and support during this process. I would also like to acknowledge the friends, co-workers, and former colleagues who have sent well-wishes and congratulations. Last, but not least, I would like to thank acting Chairman of the MSPB Mark Robbins and his staff for their tremendous assistance in preparing for this hearing.

First, I would like to tell the Committee a little about myself. I was born in a place called Clarksburg, West Virginia where my father owned a small men's clothing store that was originally opened by my great-grandfather, an Italian immigrant. A few years after I was born, my dad closed up the store and my family moved out of town. We eventually settled in Cincinnati, Ohio, where my dad continued to work in retail and my mom worked as a teacher, primarily at a Catholic elementary school. My father is the hardest working person I know. He would regularly work 70-80 hours a week, 6-7 days a week, to provide for our family. With his work schedule, my mom had to do the bulk of managing our household, which she did wonderfully while balancing her own career.

As an attorney working for the Social Security Administration and as a Federal employee, I have always tried to keep in mind that my salary is paid by the taxes of people like my parents. People who go to work everyday, work hard, and expect their government to be responsive and efficient. These people, the American people, deserve a Federal government with the best workforce possible. I believe that the MSPB plays a crucial role in achieving this goal. The MSPB helps ensure that all personnel decisions are based on merit, it helps protect whistleblowers and our veterans, it keeps the federal workforce free of partisan political activity and so much more.

In my opinion, the MSPB fulfills its mission best when it applies the relevant legal authorities as they are written and does not stray beyond its statutory mandates. The job of the MSPB is not to

favor one side versus the other, it is to protect our civil service *system* by reviewing the facts and applying the law in a neutral and fair way. When it performs its functions properly, the MSPB is one of the most important entities in achieving a Federal government that works best for the American people.

I am ready for the important job of serving on the MSPB. For nearly 10 years I have been immersed in the many complicated issues Federal agencies face. I have litigated employment law cases in many forums, including before the MSPB. I have provided legal advice on a wide variety of issues, and trained agency managers on some of the many laws they must be aware of when managing employees. I believe this experience will serve me well, if I am confirmed to the MSPB.

I am excited about this opportunity, and if the Senate confirms me, it would be an honor to serve in such an important position in our government. I will now make myself available to answer any questions the Committee may have. Thank you.

**REDACTED**

## HSGAC BIOGRAPHICAL QUESTIONS FOR EXECUTIVE NOMINEES

### 1. Basic Biographical Information

Please provide the following information.

<i>Position to Which You Have Been Nominated</i>	
Name of Position	Date of Nomination
Member (Vice Chairman)- Merit Systems Protection Board	Announced- 3/5/18 Sent to Senate- 3/12/18

<i>Current Legal Name</i>			
First Name	Middle Name	Last Name	Suffix
Andrew	Felton	Maunz	

<i>Addresses</i>					
Residential Address (do not include street address)			Office Address (include street address)		
			Street: 6401 Security Blvd.		
City: Baltimore	State: MD	Zip: 21217	City: Baltimore	State: MD	Zip: 21235

<i>Other Names Used</i>
None

<i>Birth Year and Place</i>	
<i>Year of Birth</i> (Do not include month and day.)	<i>Place of Birth</i>
1982	Clarksburg, WV

<i>Marital Status</i>						
Check All That Describe Your Current Situation:						
Never Married	Married	Separated	Annulled	Divorced	Widowed	
<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

<i>Spouse's Name</i> (current spouse only)			
<i>Spouse's First Name</i>	<i>Spouse's Middle Name</i>	<i>Spouse's Last Name</i>	<i>Spouse's Suffix</i>
Kira	Chilcote	Maunz	

<i>Spouse's Other Names Used</i> (current spouse only)						
<i>First Name</i>	<i>Middle Name</i>	<i>Last Name</i>	<i>Suffix</i>	<i>Check if Maiden Name</i>	<i>Name Used From</i> (Month/Year) (Check box if estimate)	<i>Name Used To</i> (Month/Year) (Check box if estimate)
Kira	Elizabeth	Chilcote		X	01/2001      Est X	04/2011 (still uses as work)      Est X
Kira	Elizabeth	Foreman			12/1985      Est X	12/2000      Est X

*Children's Names (if over 18) - Children are under 18*

## 2. Education

List all post-secondary schools attended.

<u>Name of School</u>	<u>Type of School</u> (vocational/technical/trade school, college/university/military college, correspondence/distance/extension/online school)	<u>Date Began School</u> (month/year) (check box if estimate)	<u>Date Ended School</u> (month/year) (check box if estimate) (check "present" box if still in school)	<u>Degree</u>	<u>Date Awarded</u>
Miami University	University	08/2001 <input type="checkbox"/> Est <input type="checkbox"/>	05/2005 <input type="checkbox"/> Est <input type="checkbox"/> Present <input type="checkbox"/>	B.S.	05/2005
University of Toledo College of Law	Law School	08/2005 <input type="checkbox"/> Est <input type="checkbox"/>	05/2008 <input type="checkbox"/> Est <input type="checkbox"/> Present <input type="checkbox"/>	J.D.	05/2008

### 3. Employment

(A) List all of your employment activities, including unemployment and self-employment. If the employment activity was military duty, list separate employment activity periods to show each change of military duty station. Do not list employment before your 18th birthday unless to provide a minimum of two years of employment history.

Type of Employment (Active Military Duty Station, National Guard/Reserve, USPHS Commissioned Corps, Other Federal employment, State Government (Non- Federal Employment), Self- employment, Unemployment, Federal Contractor, Non- Government Employment (excluding self-employment), Other	Name of Your Employer/ Assigned Duty Station	Most Recent Position Title/Rank	Location (City and State only)	Date Employment Began (month/year) (check box if estimate)	Date Employment Ended (month/year) (check box if estimate) (check "present" box if still employed)
Federal Government	Social Security Administration	Senior Attorney	Baltimor e, MD	09/2008 Est x	Present Est x
Non-government Employment	Reminger Co., LPA	Law Clerk	Toledo/S andusky, Ohio	10/2006 Est x	06/2008 Est x
State Government	Professor Rebecca Zietlow- University of Toledo	Research Assistant	Toledo, Ohio	06/2006 Est x	08/2006 Est x
State Government	Ohio Sixth District Court of Appeals	Extern	Toledo, Ohio	05/2006 Est x	08/2006 Est x
Non-government Employment	Rocky Mountain Chocolate Factory	Associate	Destin, FL	05/2005 Est x	08/2005 Est x
Non-government Employment	Sears	Cashier	Cincinnati, OH	06/04-08/04 11/04-01/05 Est x	03/2005 Est x
Non-government	RDI Marketing Services	Telemarketer	Oxford, OH	01/2005 Est x	03/2005 Est x
Non-government	Primerica	Personal Financial Assistant	West Chester, OH	05/2004 Est x	08/2004 Est x
Non-government	Adow Professionals- Cincinnati Bell	Sales	Cincinnati, OH	04/2004 Est x	05/2004 Est x
Non-government	Adow Professionals- Wine Cellar Innovations	Receptionist	Cincinnati, OH	12/2003 Est x	12/2003 (TEMP JOB) Est x
Non-government	Adow Professionals- Muscular Dystrophy Association	Volunteer Recruitment Coordinator	Cincinnati, OH	05/2003 Est x	08/2003 Est x



Non-government	45 East Bar and Grill	Busboy/ Dishwasher	Oxford, Ohio	02/2003 Est x	04/2003 Est x
Non-government	Coney Island- Larosa's	Pizza Maker/ Cashier	Cincinnati, Ohio	05/2001-05/2001 05/2001 Est x	08/2002 Est x.
Non-government	Sears Hardware	Cashier	Cincinnati, OH	1999 Est x	01/2002 (Worked here throughout high school and intermittently in the beginning of college) Est x
Non-government	Tony Roma's	Busboy	Cincinnati, OH	02/2001 Est x	04/2001 Est x

(B) List any advisory, consultative, honorary or other part-time service or positions with federal, state, or local governments, not listed elsewhere.

Note.

#### 4. Potential Conflict of Interest

(A) Describe any business relationship, dealing or financial transaction which you have had during the last 10 years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated.

I have worked at the Social Security Administration for nearly the past 10 years. I would recuse myself from any matters that I was personally involved in at SSA. I would consult with the MSPB's ethics staff on if there are any other issues involving SSA from which I should recuse myself.

In addition, my wife is currently a Federal employee. She works as an Attorney-Advisor in the Social Security Administration's Office of Appellate Operations where she assists in deciding disability claims and works on policies related to the agency's disability adjudication system. Office of Government Ethics regulations make it clear that issues arising generally from a spouse's Federal employment do not create a conflict of interest. See 5 C.F.R. § 2640.203(d). However, I would recuse myself should any matter come before the MSPB that directly involves or involved my wife.

(B) Describe any activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of any

legislation or affecting the administration or execution of law or public policy, other than while in a federal government capacity.

In 2009, in my personal capacity, I wrote a letter to Ohio State Senator Bill Seitz encouraging him to support a passenger rail bill in Ohio.

In 2009, in my personal capacity, I called Congressman Steve Driehaus's office, spoke to a staff member, and encouraged the congressman to vote against the Cap and Trade Bill.

### 5. Honors and Awards

List all scholarships, fellowships, honorary degrees, civilian service citations, military medals, academic or professional honors, honorary society memberships and any other special recognition for outstanding service or achievement.

Law School- Full Tuition Scholarship 2005-2008, graduated *magna cum laude* and made Dean's List several times, admitted to the Order of the Coif Legal Honor Society.

Awards while working at SSA-

Monetary Awards Received:

PERFORMANCE AWARD (ROC)	INDIV	8/16/2017
PERFORMANCE AWARD (ROC)	INDIV	6/12/2016
INDIVIDUAL CASH AWARD NRB	INDIV	6/13/2015
PERFORMANCE AWARD (ROC)	INDIV	6/12/2015
INDIVIDUAL CASH AWARD NRB	INDIV	6/12/2015
INDIVIDUAL CASH AWARD NRB	INDIV	8/27/2014
PERFORMANCE AWARD (ROC)	INDIV	6/29/2014
INDIVIDUAL CASH AWARD NRB	INDIV	9/3/2012
IRREG PERF PAY	INDIV	8/31/2012
PERFORMANCE AWARD (ROC)	INDIV	8/22/2011
INDIVIDUAL CASH AWARD NRB	INDIV	3/29/2010
PERFORMANCE AWARD (ROC)	INDIV	3/28/2010
EXEMPLARY CONTRIBUTION OR SERVICE AWARD (ECSA)	INDIV	7/22/2009

Non-Monetary Awards Received:

Commissioner's Team Award- 2016

General Counsel Excellence in Service Team Award- 2016

Deputy Commissioner Citation- Office of Disability Adjudication and Review- 2012

## 6. Memberships

List all memberships that you have held in professional, social, business, fraternal, scholarly, civic, or charitable organizations in the last 10 years.

Unless relevant to your nomination, you do NOT need to include memberships in charitable organizations available to the public as a result of a tax deductible donation of \$1,000 or less, Parent-Teacher Associations or other organizations connected to schools attended by your children, athletic clubs or teams, automobile support organizations (such as AAA), discounts clubs (such as Groupon or Sam's Club), or affinity memberships/consumer clubs (such as frequent flyer memberships).

<b>Name of Organization</b>	<b>Dates of Your Membership (You may approximate.)</b>	<b>Position(s) Held</b>
The Federalist Society	April 2017 - Present	None
Parishioner- Cathedral of Mary, Our Queen Catholic Church	March 2017- Present	None
Parishioner -- Basilica of the National Shrine of the Assumption of the Blessed Virgin Mary Catholic Church	2008- March 2017	None
Member- Bolton Swim and Tennis.	2012-Present	None
Toledo Law Review	2006- May 2008	Note and Comment Editor
Order of the Coif Legal Honor Society	Admitted 2008	None
Ohio State Bar Association -- voluntary bar association in Ohio. Practice of law is regulated by Ohio Supreme Court by which I have been licensed to practice law continuously since November 2008.	March 2009- March 2010 January 2016- December 2016.	None

## 7. Political Activity

(A) Have you ever been a candidate for or been elected or appointed to a political office?

No.

(B) List any offices held in or services rendered to a political party or election committee during the last ten years that you have not listed elsewhere.

None.

(C) Itemize all individual political contributions of \$200 or more that you have made in the past five years to any individual, campaign organization, political party, political action committee, or similar entity. Please list each individual contribution and not the total amount contributed to the person or entity during the year.

None.

### 8. Publications and Speeches

(A) List the titles, publishers and dates of books, articles, reports or other published materials that you have written, including articles published on the Internet. Please provide the Committee with copies of all listed publications. In lieu of hard copies, electronic copies can be provided via e-mail or other digital format.

I do not have any formally published writings. However, in the interest of full disclosure, I am providing three blog posts I made for a short-lived sports blog in 2006.

<u>Title</u>	<u>Publisher</u>	<u>Date(s) of Publication</u>
I posted these under the name "Walton4life"	Self published on the blogspot.com platform:	
Jason Whitlock is insightful- <a href="http://wherehaveyougonemargeschott.blogspot.com/2006/07/jason-whitlock-is-insightful.html?m=1">http://wherehaveyougonemargeschott.blogspot.com/2006/07/jason-whitlock-is-insightful.html?m=1</a>		7/24/2006
Wait, what are the referees wearing- <a href="http://wherehaveyougonemargeschott.blogspot.com/2006/08/wait-what-are-referees-wearing.html?m=1">http://wherehaveyougonemargeschott.blogspot.com/2006/08/wait-what-are-referees-wearing.html?m=1</a>		8/14/2006
NFL Week 1- <a href="http://wherehaveyougonemargeschott.blogspot.com/2006/09/nfl-week-1.html?m=1">http://wherehaveyougonemargeschott.blogspot.com/2006/09/nfl-week-1.html?m=1</a>		9/11/2006

(B) List any formal speeches you have delivered during the last five years and provide the Committee with copies of those speeches relevant to the position for which you have been nominated. Include any testimony to Congress or any other legislative or administrative body. These items can be provided electronically via e-mail or other digital format.

The items below do not concern Federal employment issues, but they do concern Administrative Law and the Federal government, so I am listing them here. They are presentations I gave to various groups on compliance with SSA's regulations at 20 C.F.R. sections 404.1700-1799, 416.1500-1599.

<u>Title/Topic</u>	<u>Place/Audience</u>	<u>Date(s) of Speech</u>
<p>Representative Rules of Conduct and Sanctions</p> <p>Discussed the obligations of representatives under the Social Security Administration's Regulations</p> <p>I did not have prepared remarks, but, upon request, I can provide the PowerPoint I used, if the Committee would like that. If there is video or a transcript of my presentation, the organization FOSSCR would have it.</p>	<p>Fifth Circuit Organization of Social Security Claimants Representatives (FOSSCR) 2015 Conference</p> <p>San Antonio, Texas</p>	February 28, 2015
<p>Presented on the obligations of representatives under SSA's regulations.</p> <p>Once again, I did not have prepared remarks, but, upon request, I can provide a copy of any materials I presented to the group, if the Committee would like that. If there is video or a transcript of my presentation the organization NADR would have it.</p>	<p>National Association of Disability Representatives (NADR) National Social Security Law Conference</p> <p>Washington, DC</p>	March 15, 2014
<p>Ethical Consideration when Representing Social Security Claimants</p> <p>Presented on the obligations of representatives under SSA's regulations.</p>	<p>National Organization of Social Security Claimants Representatives (NOSSCR) Conference</p> <p>Washington, DC</p>	May 17, 2013

Once again, I did not have prepared remarks, but, upon request, I can provide a copy of the PowerPoint I used, if the Committee would like that. If there is video or a transcript of my presentation the organization NOSSCR would have it.		
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(C) List all speeches and testimony you have delivered in the past ten years, except for those the text of which you are providing to the Committee.

Title	Place/Audience	Date(s) of Speech
Ethic presentation on compliance with SSA's regulations.  - Presentation on the agency's Rules of Conduct for a group of representatives.	National Association of Disability Representatives Social Security Law Conference  Las Vegas, NV	April 14, 2011
Ethics Presentation for Social Security Representatives.	Social Security Disability Law Seminar  CLE Alabama University of Alabama School of Law  Birmingham, Alabama	November 5, 2010
Ethical Considerations in Practice before the Office of Disability Adjudication and Review.	Social Security Seminar  Institute of Continuing Legal Education in Georgia	February 13, 2009

### 9. Criminal History

Since (and including) your 18<sup>th</sup> birthday, has any of the following happened?

- Have you been issued a summons, citation, or ticket to appear in court in a criminal proceeding against you? (Exclude citations involving traffic infractions where the fine was less than \$300 and did not include alcohol or drugs.)

Yes a citation for open container in 2001.

- Have you been arrested by any police officer, sheriff, marshal or any other type of law enforcement official? No.
- Have you been charged, convicted, or sentenced of a crime in any court? No.
- Have you been or are you currently on probation or parole? No.
- Are you currently on trial or awaiting a trial on criminal charges? No.

- To your knowledge, have you ever been the subject or target of a federal, state or local criminal investigation?  
No.

If the answer to any of the questions above is yes, please answer the questions below for each criminal event (citation, arrest, investigation, etc.). If the event was an investigation, where the question below asks for information about the offense, please offer information about the offense under investigation (if known).

A) Date of offense: 07/09/2001

a. Is this an estimate (Yes/No): No

B) Description of the specific nature of the offense:

Was given a citation for open alcohol container.

C) Did the offense involve any of the following?

- 1) Domestic violence or a crime of violence (such as battery or assault) against your child, dependent, cohabitant, spouse, former spouse, or someone with whom you share a child in common: Yes / No- No.
- 2) Firearms or explosives: Yes / No- No.
- 3) Alcohol or drugs: Yes / No- Yes, alcohol.

D) Location where the offense occurred (city, county, state, zip code, country):

Hamilton County Ohio.

E) Were you arrested, summoned, cited or did you receive a ticket to appear as a result of this offense by any police officer, sheriff, marshal or any other type of law enforcement official: Yes / No- Yes, citation.

1) Name of the law enforcement agency that arrested/cited/summoned you: Hamilton County Sheriff's Office.

2) Location of the law enforcement agency (city, county, state, zip code, country):

1000 Sycamore Street Cincinnati, Ohio 45202

F) As a result of this offense were you charged, convicted, currently awaiting trial, and/or ordered to appear in court in a criminal proceeding against you: Yes / No - No, I paid the fine.

1) If yes, provide the name of the court and the location of the court (city, county, state, zip code, country):

2) If yes, provide all the charges brought against you for this offense, and the outcome of each charged offense (such as found guilty, found not-guilty, charge dropped or "nolle pros," etc). If you were found guilty of or pleaded guilty to a lesser offense, list separately both the original charge and the lesser offense:

3) If no, provide explanation:

G) Were you sentenced as a result of this offense: Yes / No- No.

H) Provide a description of the sentence:

I) Were you sentenced to imprisonment for a term exceeding one year: Yes / No- No.

J) Were you incarcerated as a result of that sentence for not less than one year: Yes / No- No.

K) If the conviction resulted in imprisonment, provide the dates that you actually were incarcerated:

L) If conviction resulted in probation or parole, provide the dates of probation or parole:

M) Are you currently on trial, awaiting a trial, or awaiting sentencing on criminal charges for this offense: Yes / No- No.

N) Provide explanation:

Was provided an open container citation for alcohol before a court. Matter was expunged from my record on July 8, 2004.



### **10. Civil Litigation and Administrative or Legislative Proceedings**

(A) Since (and including) your 18th birthday, have you been a party to any public record civil court action or administrative or legislative proceeding of any kind that resulted in (1) a finding of wrongdoing against you, or (2) a settlement agreement for you, or some other person or entity, to make a payment to settle allegations against you, or for you to take, or refrain from taking, some action. Do NOT include small claims proceedings.

No.

(B) In addition to those listed above, have you or any business of which you were an officer, director or owner ever been involved as a party of interest in any administrative agency proceeding or civil litigation? Please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

No.

(C) For responses to the previous question, please identify and provide details for any proceedings or civil litigation that involve actions taken or omitted by you, or alleged to have been taken or omitted by you, while serving in your official capacity.

No.

### **11. Breach of Professional Ethics**

(A) Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or been the subject of a complaint to, any court, administrative agency, professional association, disciplinary committee, or other professional group? Exclude cases and proceedings already listed.

No.

(B) Have you ever been fired from a job, quit a job after being told you would be fired, left a job by mutual agreement following charges or allegations of misconduct, left a job by mutual agreement following notice of unsatisfactory performance, or received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as violation of a security policy?

No.

### **12. Tax Compliance**

(This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

**REDACTED**

### 13. Lobbying

In the past ten years, have you registered as a lobbyist? If so, please indicate the state, federal, or local bodies with which you have registered (e.g., House, Senate, California Secretary of State).

No.

### 14. Outside Positions

■ See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

For the preceding ten calendar years and the current calendar year, report any positions held, whether compensated or not. Positions include but are not limited to those of an officer, director, trustee, general partner, proprietor, representative, employee, or consultant of any corporation, firm, partnership, or other business enterprise or any non-profit organization or educational institution. **Exclude** positions with religious, social, fraternal, or political entities and those solely of an honorary nature.

<u>Name of Organization</u>	<u>Address of Organization</u>	<u>Type of Organization</u> (corporation, firm, partnership, other business enterprise; other non-profit organization; educational institution)	<u>Position Held</u>	<u>Position Held From</u> (month/year)	<u>Position Held To</u> (month/year)


### 15. Agreements or Arrangements

☐ - See OGE Form 278. (If, for your nomination, you have completed an OGE Form 278 Executive Branch Personnel Public Financial Disclosure Report, you may check the box here to complete this section and then proceed to the next section.)

As of the date of filing your OGE Form 278, report your agreements or arrangements for: (1) continuing participation in an employee benefit plan (e.g. pension, 401k, deferred compensation); (2) continuation of payment by a former employer (including severance payments); (3) leaves of absence; and (4) future employment.

Provide information regarding any agreements or arrangements you have concerning (1) future employment; (2) a leave of absence during your period of Government service; (3) continuation of payments by a former employer other than the United States Government; and (4) continuing participation in an employee welfare or benefit plan maintained by a former employer other than United States Government retirement benefits.

<u>Status and Terms of Any Agreement or Arrangement</u>	<u>Parties</u>	<u>Date</u> (month/year)

### 16. Additional Financial Data

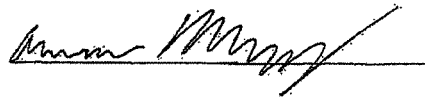
All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)

**REDACTED**

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**SIGNATURE AND DATE**

I hereby state that I have read the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

A handwritten signature in black ink, appearing to be "M. M. M.", is written over a horizontal line.

This 28th day of March 2018

**REDACTED**

UNITED STATES OFFICE OF  
GOVERNMENT ETHICS

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March 14, 2018

The Honorable Ron Johnson  
Chairman  
Committee on Homeland Security  
and Governmental Affairs  
United States Senate  
Washington, DC 20510

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Andrew F. Maunz, who has been nominated by President Trump for the position of Member, Merit Systems Protection Board.

We have reviewed the report and have obtained advice from the agency concerning any possible conflict in light of its functions and the nominee's proposed duties. Also enclosed is an ethics agreement outlining the actions that the nominee will undertake to avoid conflicts of interest. Unless a date for compliance is indicated in the ethics agreement, the nominee must fully comply within three months of confirmation with any action specified in the ethics agreement.

Based thereon, we believe that this nominee is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,  
DAVID  
APOL

Digitally signed by DAVID APOL  
DN: cn=US, o=U.S. Government, ou=Office  
of Government Ethics, ou=DAVID APOL,  
o=2342.19200XN.100.1.1-9559.002018  
20  
Email: 2018.03.14 18:30:45 -0700

David J. Apol  
Acting Director and General Counsel

Enclosures

**REDACTED**

★ ★ ★ ★

1201 NEW YORK AVENUE, SUITE 500 • WASHINGTON DC 20005

January 13, 2018

Treyer Mason-Gale  
Alternate Designated Agency Ethics Official  
U.S. Merit Systems Protection Board  
1615 M St NW  
Washington, DC 20419

Dear Mr. Mason-Gale:

The purpose of this letter is to describe the steps that I will take to avoid any actual or apparent conflict of interest in the event that I am confirmed for the position of Member and Vice Chairman of the Merit Systems Protection Board.

As required by 18 U.S.C. § 208(a), I will not participate personally and substantially in any particular matter in which I know that I have a financial interest directly and predictably affected by the matter, or in which I know that a person whose interests are imputed to me has a financial interest directly and predictably affected by the matter, unless I first obtain a written waiver, pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption, pursuant to 18 U.S.C. § 208(b)(2). I understand that the interests of the following persons are imputed to me: any spouse or minor child of mine; any general partner of a partnership in which I am a limited or general partner; any organization in which I serve as officer, director, trustee, general partner or employee; and any person or organization with which I am negotiating or have an arrangement concerning prospective employment.

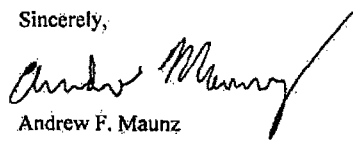
If I have a managed account or otherwise use the services of an investment professional during my appointment, I will ensure that the account manager or investment professional obtains my prior approval on a case-by-case basis for the purchase of any assets other than cash, cash equivalents, investment funds that qualify for the exemption at 5 C.F.R. § 2640.201(a), obligations of the United States, or municipal bonds.

I understand that as an appointee I will be required to sign the Ethics Pledge (Exec. Order No. 13770) and that I will be bound by the requirements and restrictions therein in addition to the commitments I have made in this ethics agreement.

I will meet in person with you during the first week of my service in the position of Member and Vice Chairman in order to complete the initial ethics briefing required under 5 C.F.R. § 2638.305. Within 90 days of my confirmation, I will document my compliance with this ethics agreement by notifying you in writing when I have completed the steps described in this ethics agreement.

I have been advised that this ethics agreement will be posted publicly, consistent with 5 U.S.C. § 552, on the website of the U.S. Office of Government Ethics with ethics agreements of other Presidential nominees who file public financial disclosure reports.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew Maunz", with a long, sweeping horizontal stroke extending to the right.

Andrew F. Maunz

**U.S. Senate Committee on Homeland Security and Governmental Affairs  
Pre-hearing Questionnaire  
For the Nomination of Andrew F. Maunz to be  
Member (to be designated Vice Chairman), Merit Systems Protection Board**

**I. Nomination Process and Conflicts of Interest**

1. Did the President give you specific reasons why he nominated you to serve as Vice Chairman of the Merit Systems Protection Board (MSPB)?  
  
No.
2. Were any conditions, expressed or implied, attached to your nomination? If so, please explain.  
  
No.
3. Have you made any commitments with respect to the policies and principles you will attempt to implement as Vice Chairman of the MSPB? If so, what are they, and to whom were the commitments made?  
  
No.
4. Are you aware of any business relationship, dealing, or financial transaction that could result in a possible conflict of interest for you or the appearance of a conflict of interest? If so, please explain what procedures you will use to recuse yourself or otherwise address the conflict. And if you will recuse yourself, explain how you will ensure your responsibilities are not affected by your recusal.

I have no business relationships, dealings, or financial transactions that would cause a conflict of interest in this position. In addition, there is nothing else that causes a fundamental conflict of interest that would interfere in my ability to serve in this position. I will consult the appropriate ethics officials on the standards for recusal on any particular case. As I mentioned previously in my biographical questionnaire, it is possible that cases that involve work I was personally involved in at SSA may require me to recuse myself. Also, due to the fact that my wife is a current federal employee (attorney at SSA), it is possible I might have to recuse myself from any cases that come before the MSPB, directly involving her, either personally or as an attorney representing a party. I believe that the chances that a case would come before the Board under either of these scenarios is slim. On the rare chance that I must recuse myself from a specific case, I would leave it up to my fellow MSPB members to make the decision without me. Otherwise, my responsibilities at the MSPB would not be affected.



## **II. Background of the Nominee**

5. What specific background and experience affirmatively qualify you to be Vice Chairman of MSPB?

I have been involved in the full spectrum of employment law in the federal government. I have litigated employment cases in a wide variety of forums, including before the MSPB. I have trained agency managers on employment issues, and I have researched and provided the agency guidance on the types of employment issues that the MSPB must decide.

In addition to my employment law experience, I have been involved in several other aspects of administrative law, such as drafting agency regulations and policies that will assist me in my duties at the MSPB.

6. What experience, if any, do you have in deciding cases, resolving disputes, or performing the other duties required in serving as Vice Chairman of the MSPB?

As someone litigating cases, I have always had to evaluate the strengths and weaknesses of each side's case, which is similar to what a member of the MSPB must do to decide cases. I have also successfully resolves many cases through settlements. This has involved working with the other side to find common ground and ways we can resolve often contentious cases.

I have also been heavily involved in SSA's Freedom of Information Act (FOIA) workload in recent years. When a FOIA case is made to the agency, the agency issues an initial decision and an appeal decision before the requester can challenge the agency's decision in federal court. One of my roles as an SSA attorney has been to review these decisions for legal sufficiency and to ensure the agency is issuing a legally correct decision in response to the FOIA request.

Furthermore, SSA's Office of the General Counsel has delegated authority to issue decisions in cases where employees are seeking a waiver of an overpayment and in requests for testimony under the *Touhy* process. In my capacity as an attorney at SSA, I have been involved in deciding these requests.

7. Please describe:

- a. Your leadership and management style.

I am someone that believes true leaders lead by example and set a positive tone for all the other individuals in their organization through their own positive behavior.

As far as managing the work of others and delegating tasks, I believe it is important to let all individuals know that, whatever they are doing, they are playing an important role in the ultimate process of completing the task. I believe that the best managers make sure

their subordinates feel that they are able to contribute their own talents and perspectives to a project. It is important to stay engaged with the people you are managing to ensure the tasks are completed timely and correctly, but I believe that you must trust their abilities and not micromanage.

b. Your experience managing personnel.

I have served as an acting division director on many occasions. I have also led projects and organized trainings when I have had to get many people on the same page to complete the task. In addition, I often review other attorneys' work when requested to provide constructive feedback and try to serve as a resource and mentor for newer attorneys in my office.

c. What is the largest number of people that have worked under you?

When serving as an acting division director, I have been responsible for about 5-7 attorneys and 1 paralegal.

### **III. Role of Vice Chairman, MSPB**

8. The Civil Service Reform Act requires that individuals appointed to the MSPB "demonstrate[] [the] ability, background, training, or experience" necessary to "carry out functions of the Board."<sup>1</sup> Please describe how your abilities, background, training, and experience qualify you for the position of Vice Chairman of the MSPB.

As discussed above in question 5, I have ample experience with the types of employment law issues the MSPB handles. I believe that I am a skilled lawyer who can analyze several complex legal issues at the same time, which will help me in deciding cases at the MSPB. In addition to my training as a lawyer, I have attended several trainings specific to MSPB issues.

9. In your opinion, what is the role of the MSPB? What is the role of Vice Chairman in carrying out the statutory objectives of the MSPB?

As an administrative agency, the MSPB's role is laid out by statutes. Primarily, it is to decide the various cases it has the authority to decide within the bounds of the relevant legal authorities. A large portion of the MSPB workload is to review federal agencies' major disciplinary actions to ensure they are lawful and have not violated the employee's rights. It also plays an important role in protecting whistleblowers, keeping the federal workforce free of partisan political activity on government time, preventing of prohibited personnel practices, and other important functions by reviewing personnel actions and applying the law as written. The MSPB also has the authority to conduct studies and review Office of Personnel Management regulations.

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<sup>1</sup> 5 U.S.C. § 1201.

While the Chairman has the authority to run the administration of the MSPB, the Vice Chairman's role is to provide support and advice to the Chairman in fulfilling these tasks, when needed. The Vice Chairman must also be ready to serve as Acting Chairman when necessary.

10. MSPB's mission is to "protect the Merit System Principles and promote an effective Federal workforce free of Prohibited Personnel Practices." How do you envision fulfilling MSPB's mission both day-to-day, and long-term?

Day-to-day, the most important way for the MSPB to fulfill its mission is to issue decisions that apply the law as it is written. Long term, the MSPB can fulfill its mission by establishing clear precedents that closely follow the text of the law. This will allow employees and agencies to have a clear picture of the legal landscape when they make their decisions.

11. What do you anticipate being the greatest challenge you would face as Vice Chairman of the MSPB, and how would you seek to prepare for and address those challenges?

The greatest challenge currently facing the MSPB is the number of cases currently waiting for a decision. As Vice Chairman, I would address this challenge by working as hard as possible to issue legally correct decisions as quickly as I can. I will also be willing to explore innovations and changes that could help the MSPB issue more decisions quickly.

12. What do you believe to be the top challenges facing the federal workforce today? What steps do you plan to take to address these challenges, if confirmed as Vice Chairman? Please explain.

This question largely focuses on policy, which is the domain of the Office of Personnel Management. The MSPB's primary role in addressing any issue in the federal workforce is to issue legally correct decisions. It also can help identify current and potential issues through the studies it has the authority to conduct.

13. Do you believe you will review and adjudicate cases that come before you with good judgment and impartiality? Please explain, citing examples of prior work or experience that could bear on your abilities, if applicable.

Yes, as discussed above, when litigating cases and providing SSA advice, I have had to look at the situation from an impartial perspective to make sure I am considering all issues and perspectives. I have also had to perform some of my work from a neutral standpoint, like the FOIA decisions I mentioned.

I believe the people I work with view me as someone who is level-headed and has good judgment. I am known in my office as someone who can look at issues and problems

from a calm perspective and as someone who is able to review the facts and the law to reach the right conclusion, without my personal preferences entering into the analysis.

#### **IV. Policy Questions**

14. What role do you think alternative dispute resolution options, including the Mediation Appeals Program, should play in the MSPB adjudication and enforcement process?

Alternative dispute resolution, including mediation, plays an important role in nearly all litigation these days. Mediation can be an effective way to resolve disputes without the costs of a trial. I personally have participated in mediation in attempts to resolve disputes on multiple occasions. There are different techniques for mediation and I believe that some techniques are more effective than others. As Vice Chairman, I would work to make sure that the MSPB's mediation program uses the most effective approaches to resolve cases and allows all parties involved to feel that the mediation was a productive use of time.

15. MSPB is statutorily responsible for conducting oversight of the Office of Personnel Management's significant actions. How will you coordinate with OPM to ensure any significant actions conform to the merit systems principles outlined in 5 U.S.C. § 2301?

5 U.S.C. § 1204(f) allows the MSPB to review OPM rules and regulations "after the effective date." Also, 5 U.S.C. § 1206 states that the MSPB's annual report will review the significant actions of OPM. The best way for the MSPB to ensure that OPM's actions conform to merit systems principles is to use these authorities to conduct meaningful oversight of OPM's actions.

16. MSPB previously highlighted the need to examine the prevalence and forms of reprisal for protected activity, particularly for whistleblowing.<sup>2</sup> Do you view reprisal for whistleblowing as a significant challenge facing the federal workforce? Why or why not?

I believe that whistleblowers play an important role in identifying malfeasance in the federal government. If an individual makes a protected whistleblower disclosure or engages in protected whistleblower activities, he or she should be protected from retaliation to the fullest extent the law allows. Any illegal reprisal against whistleblowers is significant and should be remedied immediately. I do not have access to the data at this time to determine how many of these incidents occur throughout the federal government.

17. In your opinion, is the underutilization of probationary periods a critical issue? If confirmed as Vice Chairman of MSPB, what steps would you take to ensure that managers better utilize probationary periods?

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<sup>2</sup> Merit Systems Protection Board, MSPB Research Agenda 2015-2018 (Feb. 2015), available at <https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=1140540&version=1145045&application=ACROBAT>.

This is a workforce management issue that should be left to OPM. I would decide any cases involving probationary periods in accordance with the applicable legal standards.

18. How do you view the role of information technology at MSPB as it relates to both day-to-day business and the overall mission objectives to uphold merit systems principles?

Information technology plays an important role in both how the agency decides cases and how it conducts agency business. As a practitioner, I have always been impressed with the MSPB's electronic case filing system. I believe the MSPB should explore all avenues in how information technology can allow it to hold more hearings and process cases quicker.

Information technology can also enhance the way the agency communicates with its employees across the country. I believe to the greatest extent possible the MSPB should be using technologies like video teleconferencing to allow its offices to communicate with each other and save on costly travel.

19. What role do you think merit systems studies, published by MSPB, play in ensuring a competent and efficient federal workforce?

These studies play an important role in identifying and examining emerging issues in the federal government. I believe they can be an important tool for agencies, OPM, Congress, and the White House in developing policies for the federal government workforce.

- a. What steps would you take to ensure that MSPB's external reports address critical federal workforce issues?

The best step that can be taken is to solicit feedback from outside MSPB to see which issues stakeholders in this field want to see studied. The MSPB members can take what has been suggested from the outside, as well as ideas from inside the MSPB, and use it to develop an agenda that is relevant to the federal government community.

- b. What, if any, coordination do you believe should occur between MSPB and OPM to address federal workforce issues raised by MSPB studies?

Ultimately, as the policy making agency, OPM has the responsibility to use these studies to determine what policies it should implement. However, I believe the MSPB should solicit feedback from OPM, as it would other interested parties, on what areas it would like to see studied and what information it thinks the MSPB should collect in order to study a particular area.

20. According to MSPB's Fiscal Year 2017 annual report, 22 percent of MSPB employees, including 25 percent of administrative judges, are eligible to retire in the next two years.

What steps will you take to ensure that MSPB conducts its own succession planning, so that you are able to execute your statutory duties?

The MSPB should periodically review all succession planning to ensure that it is up to date on the realities of its workforce. It should also work to make sure it is recruiting the best people to come work at the MSPB. In addition to succession planning and recruitment, the MSPB should also examine what, if any, changes it can make to its case processing that would allow it to process more cases with fewer people.

21. In March 2018, MSPB published an updated survey on sexual harassment in the federal workforce.<sup>3</sup> In this survey, 20.9 percent of women in the federal workforce and 8.7 percent of men experienced a type of sexual harassment in the two years preceding the survey.<sup>4</sup> Only eight percent of these employees believed corrective action was taken against the individual who committed the harassment, possibly resulting in employees not using agency procedures to report the harassment.<sup>5</sup> What do you believe is the role of MSPB in ensuring accountability against harassers in the federal workplace and in ensuring employees can report harassment without reprisal?

The MSPB's primary role is in reviewing the disciplinary cases of the harassers and issuing clear, predictable decisions in accordance with the law.

The law also makes it clear that it is illegal to engage in reprisal against someone who reports harassment. The MSPB can help remedy this situation by issuing decisions in the cases that come before it that clearly uphold the law and state that illegal reprisal will not be tolerated in the federal government.

22. What steps can MSPB take to improve federal supervisors' knowledge and intra-agency support regarding disciplinary and removal processes?

In order to inform not just supervisors, but the public in general, the best step the MSPB can take is to issue clear decisions that can be understood by a layperson, and not create a disciplinary process that is more complicated than the law requires. The MSPB can also continue to engage in outreach at federal government conferences and other events in order to let supervisors, employees, agency attorneys, and plaintiffs' attorneys know about the latest developments in this field.

23. Protecting whistleblower confidentiality is of the utmost importance to this Committee.

a. During your career how have you addressed whistleblower complaints?

<sup>3</sup> Merit Systems Protection Board, Update on Sexual Harassment in the Federal Workforce (Mar. 2018), available at <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1500639&version=1506232&application=ACROBAT>.

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Id.* at 8.

I believe that all whistleblower complaints should be taken seriously and a thorough examination of the facts should take place to determine what happened. My firsthand experience with whistleblower issues consists of an administrative law judge (ALJ) discipline case where a whistleblower defense was raised briefly, but not central to the case. I also assisted in the SSA's production of documents for an Office of Special Counsel investigation. I also did extensive research and wrote an internal SSA white paper of the issue of federal employees' First Amendment rights, which often coincide with whistleblower issues. Also, while not specific to whistleblowers, I have trained managers on retaliation and reprisal issues and informed them that they should not base any personnel actions on illegal retaliatory motives.

- b. How do you plan to implement policies within the MSPB to encourage employees to bring constructive suggestions forward without the fear of reprisal?

I believe in having an open door policy where employees can come to me with suggestions, concerns, and criticisms. I am not someone who is easily offended by someone disagreeing with me or having different views. I will welcome all perspectives at the MSPB, and any illegal reprisal will not be tolerated.

- c. Do you commit without reservation to work to ensure that any whistleblower within MSPB does not face retaliation?

Yes.

- d. Do you commit without reservation to take all appropriate action if notified about potential whistleblower retaliation?

Yes.

#### **V. Relations with Congress**

24. Do you agree without reservation to comply with any request or summons to appear and testify before any duly constituted committee of Congress if you are confirmed?

Yes, consistent with the law and applicable rules and regulations.

25. Do you agree without reservation to make any subordinate official or employee available to appear and testify before, or provide information to, any duly constituted committee of Congress if you are confirmed?

Yes, consistent with the law and applicable rules and regulations.

26. Do you agree without reservation to comply fully, completely, and promptly to any request for documents, communications, or any other agency material or information from any duly constituted committee of the Congress if you are confirmed?

Yes, consistent with the law and applicable rules and regulations.

**V. Assistance**

27. Are these answers your own? Have you consulted with MSPB or any other interested parties? If so, please indicate which entities.

The answers are my own. I shared a draft with acting MSPB Chairman Mark Robbins and MSPB staff to allow them to review.



**Minority Supplemental Pre-hearing Questionnaire  
For the Nomination of Andrew Felton Maunz to be  
Member (to be designated Vice Chairman), Merit Systems Protection Board**

**I. Nomination Process and Conflicts of Interest**

1. Has the President or his staff asked you to sign a confidentiality or non-disclosure agreement?

No.

2. Has the President or his staff asked you to pledge loyalty to the President or the Administration?

No.

3. Have you ever represented a party in a matter before or involving the Merit Systems Protection Board (MSPB)?

a. If so, please describe the matter(s) and the nature of the representation.

Yes. Since these are administrative proceedings, I am providing initials of the names of the litigants, unless there is a public decision of the case, in order to protect these individuals from public scrutiny.

- SSA v. JP, Docket No. CB-7521-13-0004-T-1: I represented SSA in this ALJ discipline case, which settled.
  - SSA v. McQuary, Docket No. CB-7521-11-0003-T-1: I represented SSA in this ALJ discipline case.  
<https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=736991&version=739597&application=ACROBAT>.
  - DM v. SSA, Docket No. PH-0432-10-0028-I-1: I briefly entered an appearance to represent the agency in this performance removal case, but soon left the case to deal with other more pressing workloads.
  - TL v. SSA, Docket No. PH-0752-09-0463-I-1: I represented the agency in this suspension case, which settled.
  - LB v. SSA, Docket No. DE-0752-08-0436-A-1: I represented the agency in this litigation over attorney fees after the individual had successfully got her removal overturned. I did not represent the agency in the original action challenging the removal.
4. Have you ever represented the Social Security Administration in a matter involving the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Privacy Act of 1974, or the Equal Access to Justice Act?

a. If so, please describe the matter(s) and the nature of the representation.

Yes, these four laws were listed in the first paragraph of the complaint in the case of *Ridgell-Boltz v. Astrue/Colvin* No. 2010-cv-00252. I began representing the agency in this case as a Department of Justice Special Assistant United States Attorney/ Special Attorney in September 2011. Under this status, I was working under the authority and supervision of the civil chief of the New Mexico U.S. Attorney's Office. A colleague and I represented the agency at a jury trial in the summer of 2012. I served as the second chair attorney at the trial. I also represented the agency in two appeals of the case to the 10<sup>th</sup> Circuit (*Ridgell-Boltz v. Colvin* No. 12-1495 and *Ridgell-Boltz v. Colvin* No. 15-1361). I continued to serve as the agency's counsel in the case until early 2017 when the case was finally resolved after I negotiated a settlement with the plaintiff and her counsel.

**Civil Rights Act of 1964, Age Discrimination in Employment Act, and other civil rights laws.**

I have represented the agency in several other cases that involve these laws in litigation before the Equal Employment Opportunity Commission. I am listing the cases I have handled before the EEOC that involve these civil rights laws below. As I did with the MSPB cases, I am listing the litigants' names as initials.

- African American Males Class Action, EEOC No. 531-2013-00129X. I have represented the agency for the past several years as the lead attorney in this multi-million dollar class action case that stems from a finding the agency breached a settlement agreement to resolve the original class action.
- RA v. SSA, EEOC No. 531-2009-0056X
- LB v. SSA, Petition No. 0320100006
- RJ v. SSA, EEOC No. 531-2010-00095X
- RK v. SSA, EEOC No. 531-2011-00027X
- EK v. SSA, EEOC No. 531-2008-00174X
- HM v. SSA, EEOC No. 531-2009-00244X
- HM v. SSA, EEOC No. 531-2011-00309X
- HR v. SSA, EEOC No. 531-2008-0228X
- DS v. SSA, EEOC No. 531-2008-00298X
- LB v. SSA, EEOC No. 541-2010-00033X
- DL v. SSA, EEOC No. 541-2010-00023X
- MS v. SSA, EEOC No. 570-2009-00769X
- CS v. SSA, EEOC No. 531-2009-00243X
- SB v. SSA, EEOC No. 460-2012-00002X

**Privacy Act of 1974**

- Robinson, et al. v. SSA, Civil No. 11-10524-GAO. I did not enter an appearance in the case, but I assisted the Assistant US Attorney in defending the agency in this Privacy Act case.

**Equal Access to Justice Act**

EAJA primarily serves to provide attorney fees to litigants who are litigating against the federal government. Most of the cases I am involved in feature laws that have specific provisions providing attorney fees, so I have not directly handled any cases where EAJA was an issue. It was only briefly mentioned in the Ridgell-Boltz case.

**II. Accountability**

5. During your career, has your conduct as a federal employee ever been subject to an investigation or audit by CIGIE, Office of Special Counsel, Equal Employment Opportunity Commission, Department of Justice, or any other federal investigative entity? If so, please describe the investigation or audit and its outcome.

No.

**III. Publications and Speeches**

6. Please describe the purpose and name of your blog:  
wherehaveyougonemargeschott.blogspot.com.

The purpose of the blog was just to be a fun way for me and my friend to talk about sports and to serve as a distraction from law school. It was quickly abandoned because we both got too busy.

The name was a take-off of the line "Where have you gone Joe DiMaggio?" from the Simon and Garfunkel song "Mrs. Robinson." The name was supposed to be a tongue in cheek reference to how long-suffering Ohio sports fans (my friend was a Cleveland Browns fan and I was a Cincinnati Reds and Bengals fan) often long for the "good old days," even if the people who led the teams in those days were controversial, like Marge Schott. The name in no way was meant to celebrate Mrs. Schott, nor condone any of her behavior or statements.

7. Do you maintain any other public blog(s)? If so, please share the appropriate links to each.

No.

**IV. Background of Nominee**

8. Have you represented a whistleblower or other employee in an adversarial dispute against the federal government?

No.

9. Do you seek out dissenting views and how do you encourage constructive critical dialogue with subordinates?

Yes, please see my answer to question 23b of the majority questionnaire.

10. Please give examples of times in your career when you disagreed with your superiors and aggressively advocated your position. Were you ever successful?

While I am not sure I disagreed with my superiors or “aggressively advocated” my position, one situation that I can think of where I was able to convince not just my immediate supervisors, but also agency executives, to take an action they may not have taken otherwise is when I convinced the agency to ask for an opinion from the Department of Justice Office of Legal Counsel (OLC) on the legality of an EEOC order. I advocated my idea at several levels of the agency and was able to convince all relevant individuals that this was the right course of action. Ultimately, OLC agreed with my position and issued an order in the agency’s favor. <https://www.justice.gov/opinion/file/833591/download>

11. What would you consider your greatest successes as a leader?

I consider my greatest success as a leader the securing of the OLC opinion I described above in question 10. I truly feel that I was able to lead the agency to a result that it likely would not have otherwise pursued.

12. Why do you want to serve as Vice Chairman of MSPB?

It would be a great opportunity to serve in such an important role in our government and to help ensure that our civil service laws are applied properly.

13. What type of managerial style do you think is necessary for the role of Vice Chairman of MSPB?

I believe that the Vice Chairman of the MSPB should lead by example and set the tone for the agency by conducting himself with integrity. Please also see my answer to question 7a of the majority questionnaire.

14. If an accusation of discrimination were to arise within an office under your management, what actions would you take to address such an accusation?

I would ensure that the allegations are processed under the appropriate procedures in accordance with MSPB’s policies for handling discrimination claims.

15. Do you have experience addressing instances of prohibited personnel practices (PPPs)? If so, please generally describe your experience.

As described above, I have litigated numerous discrimination cases before the EEOC.

16. Do you have any experience adjudicating matters? If so, please provide an example.

Yes, please see my answer to question 6 of the majority questionnaire.

17. How will your experience help MSPB maintain MSPB's Merit System Principles (MSPs)?

My experience in the federal government has given me first-hand experience in how important it is that MSPs are maintained and that the federal government operates under the highest standards. Using this background, I will be able to take the necessary actions to maintain MSPs.

18. What lessons from your time as a Senior Attorney with the Social Security Administration (SSA), will you bring with you to MSPB, if confirmed?

My experience with SSA has not only given me familiarity with many of the laws that the MSPB administers, but also has given me experience for how agencies actually operate. I have learned lessons about the challenges agencies face in managing their workforce and also about the perspectives that many employees have. Familiarity with these issues will be invaluable to my work with the MSPB, if I am confirmed.

#### V. Policy Questions

19. Precedents, findings, recommendations and reviews of Office of Personnel Management (OPM) rules by the MSPB have potential to directly affect how employees are managed and how their appeals are decided. What role do you believe the MSPB should play in developing personnel policy?

The role of the MSPB is to issue legally correct decisions. Other agencies are responsible for developing personnel policies.

20. The MSPB has the statutory responsibility to conduct objective, non-partisan studies that assess and evaluate Federal merit systems policies, operations, and practices. These studies are typically government-wide in scope and ensure that the workforce is managed in accordance with MSPs and is free from PPPs. What role do you believe MSPB's data collection should play in supporting personnel policy?

My understanding is that the data the MSPB collects for its studies is available to policy makers to use to make their decisions.

21. MSPB has been without a quorum of Board members since January 8, 2017. The lack of a quorum contributes to delays in issuing final decisions in petitions for review (PFRs) and other cases filed at headquarters (HQ) and releasing reports of merit systems studies.

- a. The MSPB currently estimates that it will take months or longer to process the inventory of cases at HQ and to publish merit systems studies reports once new

Board members are nominated and confirmed. Please describe how you will effectively and promptly address MSPB's current backlog.

One of the first things that I believe the newly confirmed members of the MSPB should do is develop a plan to try to address the backlog as quickly as possible. Personally, I am committed to working as quickly as possible so the agency can issue cases as fast as it can.

- b. Please describe how your previous work experience has prepared you to address the challenges in resolving MSPB's backlog.

While at SSA, one of the main focuses of the agency during my career has been reducing the number of cases pending for a hearing before an ALJ. Therefore, I am familiar with an agency working to reduce its backlog and have been involved in some of the agency's efforts to process cases faster. In particular, I have been involved in providing legal guidance for the agency's policies concerning the claimants' representatives that appear before the agency. Many of these policies have been focused on the agency's ability to process cases quickly. As examples, I have worked with the agency to implement new regulations, clarify the agency's submission of evidence rules, and require representatives to use the agency's electronic services in certain situations.

- c. The MSPB Vice Chairman has voted on over 800 PFR cases which also await consideration by new Board members. If confirmed, please describe how you will work with your colleagues to consider cases awaiting decisions.

As I stated above, I believe my colleagues and I should immediately work on a plan to tackle the number of cases pending before the MSPB.

- d. Do you have experience with resolving backlogs such as the one faced by MSPB? If so, please describe your experience.

Yes, my experience with SSA as described above in the answer to 21b.

- e. Have you sought advice from any current or former MSPB employees about how to best address the current backlog? If so, please describe your consultations.

The current acting Chairman Mark Robbins has generally explained the situation to all of the nominees.

22. MSPB functions as an independent, third-party adjudicatory authority for employee appeals of adverse actions (e.g., removals, suspensions for more than 14 days, and furloughs) and retirement decisions.

- a. Please describe your experience in developing adjudicatory processes and procedures, issuing subpoenas, calling witnesses and enforcing decisions.

In addition to my litigation experience that I have already described, I have worked to help develop the adjudicatory processes SSA uses to disqualify claimants' representatives from appearing before the agency. *See* 20 C.F.R. §§ 404.1700-.1799. I have also handled actions to disqualify representatives from practice before SSA. In those actions, I have requested subpoenas and implemented the agency's decision to disqualify the representative.

- b. Please describe how your previous work experience has prepared you to execute and supervise these actions at MSPB.

I have a variety of experience litigating in various forums. This experience has prepared me for fulfilling my role at the MSPB.

23. How should Board members seek to safeguard their independence?

The best way for Board members to safeguard their independence is to issue decisions that are based on nothing more than the appropriate legal standards and to only issue decisions that are based on their best judgment, not the pressures from any outside forces.

24. MSPB was given the authority and responsibility to review the rules, regulations, and significant actions of OPM. Do you have any concerns about OPM's current rules, regulations or recent actions? If so, please describe those concerns.

I would have to better familiarize myself with all of OPM's rules, regulations, and significant actions before I could answer this question.

25. Do you believe MSPB has the resources it needs to meet current challenges? Please explain.

I am not in a position to answer this without more information on the internal workings of the MSPB and its current resources.

26. How will you address the occurrence of PPPs with internal employees of MSPB?

MSPB managers should be trained appropriately so that PPPs do not occur in the first place. If there are allegations of PPPs at the MSPB, I would ensure that the complaint is handled properly in accordance with the MSPB's processes.

27. In some cases, complainants who may be better served by other government agencies such as the EEO or OSC seek assistance from the MSPB.

- a. How will you work to ensure that your staff effectively guides these complaints to the appropriate resources?

Make sure staff reroutes cases that are not in the MSPB's jurisdiction quickly and efficiently.

- b. Will you collaborate with other government agencies to minimize duplication? If so, please describe how you will work to achieve this objective.

I believe agencies should communicate with each other and the public to ensure that the appropriate cases are filed with the correct agency.

*Hatch Act*

28. What would you consider to be an appropriate penalty for a violation of the Hatch Act by a senior administration official?

While I am not sure what you mean by "senior administration official," most individuals who would fall under that term are exempted from the MSPB's Hatch Act jurisdiction. The penalty for any Hatch Act violation should depend on the facts of the case.

*Whistleblower protections*

29. Please describe any previous experience—in the public or private sector—with handling whistleblower complaints, and what steps you took to ensure those individuals did not face retaliation and that their claims were thoroughly investigated?

Please see my answer to question 23a of the majority questionnaire.

30. OSC has filed an amicus brief opposing an MSPB decision that ruled against a whistleblower alleging retaliation because the MSPB said the whistleblower's disclosure was motivated by "interpersonal squabbling." Do you believe that the motive of the whistleblower should be considered when examining retaliation claims? Please explain.

I am not familiar with that specific case and would need to examine the issue in more detail before I can opine.

31. OSC filed three amicus briefs in 2017 opposing the MSPB's alleged attempts to impose higher procedural burdens on whistleblowers. Do you believe that whistleblowers should be subjected to higher procedural burdens before their cases are considered by administrative judges? Please explain.

I am not familiar with that specific case and would need to examine the issue in more detail before I can opine.



32. OSC has also filed amicus briefs opposing the application of higher evidentiary burdens on whistleblowers. OSC has written that this burden "runs directly counter to Congress's intent in passing the WPEA's enhanced protections for federal whistleblowers." Do you believe that any whistleblowers should be subjected to higher evidentiary burdens? Please explain.

I am not familiar with that specific case and would need to examine the issue in more detail before I can opine.

33. If confirmed, how will you ensure that whistleblower complaints are properly investigated?

The Office of Special Counsel has the responsibility for investigating whistleblower complaints. MSPB can ensure that the complaints are properly investigated by using its authority under 5 U.S.C. § 1212(b)(3)(A) to enforce OSC subpoenas.

#### **VI. Relations with Congress and the Public**

34. If confirmed, how will you make certain that you will respond in a timely manner to Member requests for information?

Yes, consistent with the law and applicable rules and regulations.

35. If confirmed, do you agree without reservation to reply to any reasonable request for information from the Ranking Member of any duly constituted committee of the Congress?

Yes, consistent with the law and applicable rules and regulations.

36. If confirmed, do you agree without reservation to reply to any reasonable request for information from members of Congress?

Yes, consistent with the law and applicable rules and regulations.

37. If confirmed, do you commit to take all reasonable steps to ensure that you and your agency comply with deadlines established for requested information?

Yes, consistent with the law and applicable rules and regulations.

38. If confirmed, do you commit to protect subordinate officials or employees from reprisal or retaliation for any testimony, briefings or communications with members of Congress?

Yes, consistent with the law and applicable rules and regulations.

39. If confirmed, will you ensure that your staff will fully and promptly provide information and access to appropriate documents and officials in response to requests made by the Government Accountability Office (GAO) and the Congressional Research Service?

Yes, consistent with the law and applicable rules and regulations.

40. If confirmed, will you agree to work with representatives from this Committee and the GAO to promptly implement recommendations for improving MSPB's operations and effectiveness?

Yes, consistent with the law and applicable rules and regulations.

41. If confirmed, will you direct your staff to fully and promptly respond to Freedom of Information Act requests submitted by the American people?

Yes, consistent with the law and applicable rules and regulations.

42. If confirmed, will you ensure that political appointees are not inappropriately involved in the review and release of Freedom of Information Act requests?

Yes, consistent with the law and applicable rules and regulations.

#### **VII. Assistance**

43. Are these answers your own? Have you consulted with MSPB or any other interested parties? If so, please indicate which entities.

The answers are my own. I provided a draft to acting MSPB Chairman Mark Robbins and the staff of the MSPB for their review.

I, Andrew F. Mann, hereby state that I have read the foregoing Pre-Hearing Questionnaire and Supplemental Questionnaire and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

Andrew F. Mann  
(Signature)

This 11th day of July, 2018

**Chairman Ron Johnson  
Post-Hearing Questions for the Record  
Submitted to Mr. Andrew F. Maunz**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,  
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,  
Andrew F. Maunz to be a Member of the Merit Systems Protection Board, and  
Carmen G. McLean to be an Associate Judge of the Superior Court of the District  
of Columbia  
Thursday July 19, 2018**

Do you think it is appropriate to withhold in MSPB opinions the identity of an employee who is found to have committed a prohibited personnel practice? If so, please explain the reasons you believe the identity should be withheld.

No. I understand that, while the Board may withhold the identity of an appellant or a respondent by granting anonymous "John Doe" status, such status is granted very rarely. A party seeking anonymity must overcome the presumption that parties' identities are public information. Anonymity is granted only in unusual circumstances, such as to prevent a clearly unwarranted invasion of a third party's privacy, to preserve the appellant's physical safety, or when the matters involved are of a highly sensitive or personal nature.

**Senator Claire McCaskill  
Post-Hearing Questions for the Record  
Submitted to Mr. Andrew F. Maunz**

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**Whistleblower Protections**

The MSPB is one of several entities -- including Inspectors General and the Office of Special Counsel (OSC) -- that play a role in protecting whistleblowers from retaliation, and ensuring that whistleblowers are made whole if they experience prohibited personnel practices

Congress has passed numerous laws to protect whistleblowers since the very founding of this country. Most recently, and most relevant to MSPB, are the Whistleblower Protection Enhancement Act (WPEA) and the recent enacted All Circuit Review Act. It is important to emphasize that Congress keeps passing laws and expanding protections because we believe whistleblowers are important and should be protected. Yet, sometimes the institutions charged with protecting whistleblowers do not heed this intent. We need to make sure that these institutions are operating on principles of transparency, accountability, and fairness.

Q. Under oath, will you commit that federal employees will continue to have access to all the avenues of appeal available to them if you are confirmed?

I can only commit to the avenues of appeal available to Federal employees at the MSPB, to the extent they exist under law, rule or regulation.

Q. What will you do to ensure that the MSPB fosters a reputation for being an institution that is fair to whistleblowers?

MSPB's job is to fairly, impartially and expeditiously adjudicate whistleblower claims consistent with both statutory provisions and controlling case law from Courts of competent jurisdiction. Without speaking for my possible future colleagues, I believe this will be a high priority for the Board once a quorum is restored.

Q. MSPB's significant case backlog, soon to reach 1,300 petitions for review, can lead to continuing injustice for whistleblowers. What will you do to address this backlog?

Addressing the backlog quickly, while still providing high-quality decisions, will be one of my top priorities if I serve on the MSPB. I believe that my fellow nominees and I will

be able to work well together to establish a plan to decide cases quickly and accurately to bring down this backlog as soon as possible.

- Q. Do you believe that the Administrative Judges hearing cases have sufficient training in whistleblower protection laws to ensure that rulings are not contrary to the law? What will you do to ensure that all employees within MSPB have a proper understanding of whistleblower protections?

I believe that all employees should receive the training they need to perform their jobs to the best of their abilities. I do not have specific knowledge of what types of training MSPB employees, including administrative judges, have access to during their careers. If confirmed, I will ensure that administrative judges and all other MSPB employees have access to all of the training they need on whistleblower protections and all other topics.

We have seen troubling instances where there has been burden shifting onto the whistleblowers, where the law is clear that the agency bears the responsibility to show by clear and convincing evidence that there was no prohibited personnel practice.

- Q. Do you have concerns with burden shifting, and, if so, what should be done to address this? What additional efforts should be made to ensure that there is not improper burden shifting?

Without context of the particular situations in which burden shifting might be an issue, I cannot answer this question.

- Q. Burden shifting is a key issue in cases where certain employees, like auditors and investigators, are reporting concerns in the course of their duties. OSC has argued that MSPB has wrongly determined that these employees had a higher evidentiary burden than the law required. What are your views of this argument? Does MSPB need to look more closely at this issue?

If confirmed, the issues and concerns raised by the Office of Special Counsel are matters that could come before me in existing or future cases that I will adjudicate. As such, it would be inappropriate for me to comment on this now.

**Senator Gary Peters  
Post-Hearing Questions for the Record  
Submitted to Mr. Andrew F. Maunz**

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1. During this morning's hearing, you stated that you have not had the opportunity to review the proposed Modern Employment Reform, Improvement, and Transformation Act (MERIT Act), H.R. 599, which would significantly reduce the time it takes to fire a federal worker accused of poor performance or misconduct. The bill reduces the time for an employee to appeal firing decisions, or for the U.S. Merit Systems Protection Board (MSPB) to intervene on their behalf, and extends new employee probationary periods to two years. It would also allow agencies to avoid negotiated grievance procedures, reduce benefits of workers who are convicted of a felony and fired, and rescind bonuses or other cash awards deemed to be wrongly paid. On Tuesday, July 17, 2018, the nation's largest federal union, the American Federation of Government Employees, AFL-CIO (AFGE) signaled its strong opposition to The MERIT Act, arguing that the legislation would make it easier to fire federal employees and would give agencies alternative mechanisms for the punishment of federal workers. **After reviewing the legislation, do you believe it will support or undermine the due process system that provides federal workers with a meaningful opportunity to defend themselves when treated unfairly? How would the legislation impact the ability of the MSPB to review the appeals of employees who feel they have been wrongly terminated in a timely manner? Would eliminating or shortening processes for federal workers to challenge firing decisions of agencies, and empowering agencies to take-back bonuses or garnish benefits, improve federal employment practices?**

MSPB staff has reviewed the language of H.R. 599, the Modern Employment Reform, Improvement, and Transformation (MERIT) Act, as passed by the House Oversight Committee on July 17, 2018, and advised me that they do not believe the legislation addresses any issues of jurisdiction, procedure, substantive case law or any other matter concerning Board operations. MSPB staff does not currently believe that this legislation would negatively impact the Board's ability to review the appeals of employees who are the subject of an agency adverse action over which the Board has jurisdiction to adjudicate. As I mentioned at the hearing, the Supreme Court has provided clear guidance on when due process

rights for public employees attach and what pre-termination steps must be taken to satisfy due process requirements. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-46 (1985). As long as any statutory process is consistent with these due process requirements, the length of the appeals process and any other associated issues is a question of policy better addressed by policy makers in Congress. And it should be noted that whether any new process is consistent with Constitutional due process is an issue likely to be raised before the Board in the first instance. As such, it would be inappropriate for me to form an opinion in advance.

2. The House of Representatives Committee on Oversight and Government Reform recently voted to approve a five year reauthorization for the MSPB after more than a decade since its last authorization expired in 2007. Included in the reauthorization legislation was language that would allow MSPB members to issue summary judgments, reduce the burden of proof for agencies to justify adverse personnel actions from “a preponderance of the evidence” to “substantial evidence,” and it would require federal workers to pay a filing fee to appeal adverse personnel actions. The bill reduces the time to seven days for employees to respond to a notice of proposed discipline; require the agency to make a final decision within 15 days afterward; and allow only seven days, rather than 30, for the employee to appeal to the MSPB. **In your opinion, do you believe it is too hard currently to fire federal employees? Do you believe reducing the burden of proof to justify adverse agency decisions is appropriate? Should you be confirmed, how would you ensure that federal employees are treated fairly?**

This is largely a policy question not relevant to the Board’s jurisdiction or its operations. I believe that if the MSPB issues clear, understandable decisions that are within the bounds of the law, current law gives sufficient tools to agencies to hold employees accountable. Issues such as burdens of proof are best left to policy makers in Congress to decide. If confirmed, I would ensure that federal workers are treated fairly by reviewing every case with an open mind and making my decision based on the facts and relevant legal authorities.



3. As noted in some of your questionnaires, the MSPB last published its research agenda in 2015, which expires in 2018. In order to develop the agenda, the previous MSPB took numerous steps to solicit input from stakeholders, including the heads of federal agencies, major federal employee unions, and professional associations with expertise in federal workforce issues. **What is your plan to develop an updated research agenda? What would you change from the outreach approach taken by the MSPB in 2015? Who would you consider to be important stakeholders in MSPB's research agenda? How will you analyze the feedback from stakeholders in order to make decisions about research topics? How will you decide which topics to prioritize?**

The current research agenda was adopted by the previous Board in 2015 to last for a period of 3-5 years. I understand there are several research projects awaiting review by a new quorum. It will be up to the new quorum to set a research agenda. I am not familiar with Board history on how research agendas previously have been adopted, including the most recent one in 2015. I anticipate that, if confirmed, we will reach out to stakeholders both inside the government, including Congress, employee representatives in both management and labor, and outside the government, including academia, and good government groups, to get suggestions for research which would lead to broadly beneficial studies. Not being currently familiar with this process, I do not know how stakeholder feedback is analyzed or how final decisions are ultimately made.

**Senator Heidi Heitkamp  
Post-Hearing Questions for the Record  
Submitted to Mr. Andrew F. Maunz**

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- What is an experience or situation from your life that shaped your outlook on the critical federal employee issues that MSPB considers and decides? Why did that situation impact you in the way that it did?

I have worked in the federal government as a career employee since 2008. While working in the government, I have seen what an important role the MSPB plays in ensuring that our government operates efficiently for the American people and that federal employees are treated fairly. My exposure to the inner workings of the federal government has given me great insight into what a positive force for “good government” the MSPB can be.

- What role should previous MSPB decisions or other relevant precedents play in how an MSPB board member decides cases or makes decisions?

Precedent plays an important role in judicial and administrative decision-making. If confirmed, I will carefully consider all relevant precedents, including whether a previous MSPB decision was correct, and arguments raised by the parties in deciding cases that come before the Board.

- If you are confirmed and you come across a case where there is clear precedent, but, when you look at the case closely, you begin to question if that previous decision was decided correctly.
  - How should a MSPB board member go about determining when a precedent needs to be changed?

An adjudicator’s job is to apply the law to a given set of facts unique to the case in question. If confirmed, I will carefully consider all relevant precedents and arguments about those precedents raised by the parties in deciding cases that come before the Board and question precedent when it is appropriate and necessary to do so.

- What role does the federal workforce play in the United States, and what do the American people need from the federal workforce?
  - How should MSPB board members use their authority and decide cases to ensure those goals come to pass?

The question of what role the Federal workforce plays in the U.S. and the needs of the American people are policy questions better addressed by policy makers in Congress. However, to assist the policy makers in their considerations, the Board owes it to them and the American people to provide fair, timely and impartial decisions on matters brought to it for adjudication.

- What changes need to be made to MSPB, its jurisdiction or its authority?

I'm not currently aware of any needed changes to Board jurisdiction or authority.

- Many federal employee and federal employee groups feel that recent Executive Orders from this administration on issues such as making it easier to let go of poor performing federal employees or curbing the use of official time are direct assaults on federal employees and their long-held civil service rights.

- What is your opinion of these executive orders?

Opinions on the content of the Executive Orders is a policy question not within the Board's jurisdiction.

- How do you feel that these executive orders will impact your potential work at MSPB?

The Executive Orders do not make any direct requirements on the MSPB's adjudication process, but issues discussed in the Executive Orders may be raised by litigants before the MSPB.

- What are your plans to use your role on MSPB to protect the rights of federal employees?

The Board protects the rights of federal employees by fairly, timely and impartially adjudicating its case load.

- Do you feel that the May 25 Executive Order, which addressed how agencies should deal with poor-performing federal employees, can work in concert with the statutory protections that federal employees are provided?

As discussed above, this is a policy question not within the Board's jurisdiction.

- What is MSPB's role in determining how to balance the directives to agency heads in that executive order with the statutory protections which are the foundation of the civil service code?

The question whether there are any conflicts between provisions of Title 5 and the May 25, 2018 executive order might arise in cases that come before the Board. As such, it would be inappropriate for me to form an opinion at this point.

Additional questions below

Administrative Law Judges (ALJs) have unique statutory protections from unlawful removals. 5 U.S.C. §7521 generally states that an ALJ can only be removed after good cause to do so was established and determined by the MSPB on the record after opportunity for a hearing. The recent Executive Order that moved ALJ hiring from the competitive service to the excepted service does not impact the 5 U.S.C. §7521 protections.

- In your opinion, is it important to have specific protections against the unlawful removal of ALJs in federal statute?
  - Why or Why not?

Yes. It is important to have specific protections against the unlawful removal of administrative law judges in Federal statute. The protections contained in 5 U.S.C. § 7521 ensure that adverse actions against administrative law judges are taken solely for performance or conduct reasons and not an effort to interfere with an administrative law judge's qualified decisional independence.

- If confirmed, what steps would you take to examine a case where an agency claimed good cause to fire an ALJ to ensure the agency claim was correct?

If confirmed, I will consider all relevant legal authorities and arguments raised by the parties in cases before the Board, including any cases involving dismissal of an administrative law judge.

- In your opinion, does 5 USC §7521 require that MSPB determine if the good cause threshold to remove an ALJ has been met, or does it just require that MSPB determine only if there is sufficient evidence to prove an agency's determination of "good cause"?
  - Please explain the reasoning behind your answer.

If confirmed, I will consider all relevant legal authorities and arguments raised by the parties in cases before the Board, including arguments concerning 5 U.S.C. § 7521, which states that actions may be taken against administrative law judges "only for good cause established and determined by the" MSPB.

- In recently published news articles (<https://www.reuters.com/article/us-otc-dojmemo/in-confidential-memo-to-agency-gcs-doj-signals-aggressive-stand-on-firing-aljs->

idUSKBN1KD2BB) about Department of Justice guidance to agencies on how to navigate ALJ issues in the wake of the recent *Lucia v. SEC* Supreme Court decision, DOJ argued that MSPB should be suitably deferential to the determinations of agency heads when it comes to the removal of ALJs.

- o What role should MSPB play in safeguarding the president's power to supervise the executive branch?

The MSPB's role is to apply the law in cases that come before it. If confirmed, I will decide cases within MSPB's jurisdiction fairly and in accordance with applicable law.

- o How would you define "suitably deferential" in terms of MSPB's responsibilities to safeguard and protect federal employees from unlawful removals?

To my knowledge, "suitably deferential" is not a standard currently contained in Title 5, Board case law, or other binding precedent. To the extent the concept could arise in the context of Board consideration of a matter before the Board, it would be inappropriate for me to form an opinion prematurely.

- o What role can MSPB play in ensuring that ALJs are not removed for any invidious reasons or to influence a particular outcome?

5 U.S.C. § 7521 states that an adverse action against an administrative law judge may be taken "only for good cause established and determined by the Merit Systems Protection Board." The Board can ensure this provision is enforced by fair, impartial and timely adjudication of any such actions.

- As mentioned earlier, the recent Executive Order on ALJs recently moved ALJs into the excepted service. That means ALJs will be excepted service employees, giving agencies greater flexibility to hire ALJs as they see fit. However, the ALJs will continue to have significant merit system protections against removal or other significant employment punishment without good cause?
  - o What challenges to a member of the MSPB are presented when federal employees are both excepted employees and have significant merit system protections?

I am not currently aware of any such challenges. Most excepted service Federal employees have had appeal rights to the Board since passage of the Civil Service Due Process Amendments, P.L. No. 101-376 (Aug. 17, 1990).

- In your opinion, what responsibility do MSPB members have to ensure that ALJs follow agency policies, procedures or instructions?

The MSPB's role is to apply all applicable laws in cases coming before the Board, including cases involving adverse actions against administrative law judges, as discussed in 5 U.S.C. § 7521. In examining whether there is good cause, the MSPB has at times examined whether an administrative law judge has followed lawful agency policies, procedures, or instructions.

**Senator Kamala Harris  
Post-Hearing Questions for the Record  
Submitted to Andrew F. Maunz**

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,  
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,  
Andrew F. Maunz to be a Member of the Merit Systems Protection Board, and Carmen G.  
McLean to be an Associate Judge of the Superior Court of the District of Columbia**

**Thursday July 19, 2018**

**Ability to Appear Fair and Uninterested**

While in law school you contributed to a sports blog – “Where have you gone Marge Schott?” – named after the former Cincinnati Reds owner who made racist, homophobic, and anti-Semitic remarks. The blog includes writing that is demeaning to people with disabilities, LGBTQ people, people of color, and women; some of the posts are by you and some of them are by other contributors.

For instance, you wrote: “Yet when I turn on my T.V. all I hear about is how great this team is, or how terrible this other one is. I mean for christ sakes John Clayton is slobbering on more knobs than Paris Hilton at a Greek shipping heir convention.” (Citation: <http://wherehaveyougonemargeschott.blogspot.com/>)

In response to a committee staff question about that comment, you stated that you could not have misogynistic attitudes or gender bias because you have female family members that you love and respect. This further raises concerns, as it suggests a lack of understanding as to why it raises concerns. Nor did you actually address the substance of your comments.

The MSPB is tasked with protecting federal employees from Prohibited Personnel Practices, including hearing appeals in which an employee alleges discrimination on the basis of race, religion, national origin, orientation, sexual orientation, or disability. These comments, along with others written on a blog named after Marge Schott, raise concerns that you may not be able to serve as a fair adjudicator of discrimination claims.

1. How can women, people of color, LGBTQ people, or people with disabilities be confident that you would be an impartial adjudicator of their cases considering your comments and the content of that blog?

I am an open-minded person who believes in treating every person I encounter with dignity and respect. I choose to live in a diverse neighborhood in the city of Baltimore. My community contains people of different races, ethnicities, religions, and sexual orientations. For example, my neighbors are two gay African American men with whom my family has exchanged gifts on several occasions. On a daily basis, both in my personal and professional lives, I encounter people of various backgrounds. I treat everyone as I would like to be treated myself, and I teach my children to do the same. The FBI and this Committee have thoroughly investigated my background. No incidents of bigotry or bias were found because none exist.

I believe in viewing people as individuals and not prejudging them. I will bring this approach to deciding cases at the MSPB. I will approach every case with an open mind, and my decision will be driven by the facts of the case and the law. Every person will be able to receive justice from the MSPB, if I am a member.

Regarding the blog, when I voluntarily disclosed its existence to the Committee, I pointed to the three posts for which I was responsible. The Committee staff read from several posts I did not write. The only language they read that was from something I wrote is the above quoted language about Paris Hilton. I had no editorial control over what anyone else wrote on the site.

2. Do you believe that having female family members means that one cannot show gender bias?

No.

3. If not, then please explain your response to that blog post?

In the interview with staffers, I did address the substance of my comments. I said the language was crude and inappropriate, I disavowed it and said I would not use that language today, and said that if I had the opportunity, I would apologize to Paris Hilton. I mentioned the many women I love and respect in my life to give insight into who I am. I have been surrounded by strong, independent women my entire life. My wife is a lawyer, my sister is a doctor, my mother is an incredibly independent person, and I am raising my daughters to be the same. I celebrate all of their accomplishments.



I, Andrew F. Maunz, hereby state that I have read the foregoing Post-Hearing Questions for the Record and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

Andrew F. Maunz  
(Signature)

This 26th day of July, 2018



July 26, 2018

U.S. Senate Committee on Homeland Security  
and Governmental Affairs  
340 Dirksen Senate Office Building  
Washington, D.C. 20510

To Whom It May Concern:

My name is Kira Chilcote Maunz and I'm an attorney, mother, and lifelong Democrat. I am also the wife of Merit Systems Protection Board member nominee Drew Maunz.

I grew up in rural Ohio where we had few Democrats and virtually no female attorneys. I became politically engaged at a young age and later became the President of the Holmes County, Ohio Young Democrats in high school. Through this role, I endlessly volunteered and worked at local events to elect Democrats in local, state, and federal elections. In college, I had the privilege of interning full-time for six months for my childhood role model, U.S. House Democratic Leader, Rep. Nancy Pelosi, in her leadership office. Following this experience, I worked on a small campaign staff to elect former U.S. Rep. Zack Space of Ohio to flip Rep. Bob Ney's seat blue. In law school, I was an active member of the Women's Law Student Association. My social circle includes a strong, diverse group of women. While I personally do not approve of the language my husband used regarding Ms. Hilton in 2006, it is not indicative of who he is as a person. Given my personal and professional background, I could not and would not tolerate having a misogynist as an acquaintance let alone a partner.

Drew Maunz is a person who supports and champions women. This is not by virtue of familial relationships, but based upon his core values and respect for women. In his personal life, he goes out of his way to offer career advice, childcare assistance, and moral support to our friends. He has helped so many of my female friends with career assistance that I have lost count.


In our personal lives, my husband performs many roles that were once associated with women. He washes dishes, packs lunches, changed virtually all the diapers for two children, and takes our kids to and from school, dance class, soccer, basketball, etc. He does not demand recognition for his efforts and has never told me these chores are reserved for women.

Instead, he does them because he is their parent and our children are blessed to have an active male caregiver in their lives.

I grew up with a single mom in a home with my grandparents and adult aunt with an intellectual disorder. My aunt was unable to live independently or work, and could not read or write beyond a second grade level. I do not surround myself with individuals who use slurs against the disabled. My husband has not once used that repulsive language.

Finally, the day my husband received the Committee's post-hearing supplemental questionnaire inquiring as to whether he was a misogynist, he had just returned from donating boxes of diapers to a neighborhood charity for women and children.

Best regards,

A handwritten signature in black ink, appearing to read "Kira C. Maunz". The signature is fluid and cursive, with a long horizontal stroke at the end.

Kira Chilcote Maunz

July 25, 2018

To Whom It May Concern:

This letter is written in support of Drew Maunz in his pursuit of a position with the Merit Systems Protection Board (MSPB). I consider Drew and his wife Kira Chilcote Maunz, a colleague of mine, to be dear family friends.

I am a single mother to two girls, ages five and eight. I have been the primary caregiver to them since October 2016. When my husband and I first separated and I was on my own, I was overwhelmed. Drew and Kira were quick to offer their support and company whenever I needed it. We have spent time in each other's homes and our daughters have become friends. I have observed Drew with his daughters and with my own, and he is an amazing father. He shares parenting responsibilities with Kira equally and contributes in the home with both childcare and household maintenance duties.

Drew provides advice and ongoing encouragement in support of my pursuits in my career. He sets an outstanding example of someone who maintains high standards of ethics and morality throughout every facet of his life, from the personal to professional. I can think of no one else that I would recommend as strongly and sincerely as I would Drew for a position with the MSPB. I have every confidence that in that position, Drew will continue to maintain the same level of impartiality and professionalism that he has maintained thus far.

Thank you,

/s/ Jennifer Margolese, Esq.

██████████  
██████████

July 24, 2018

To Whom It May Concern:

My friend and former colleague Kira Chilcote Maunz has asked me to provide a statement to the US Senate Committee on Homeland Security and Governmental Affairs regarding her husband Drew Maunz's ability to be fair towards members of the LGBT community. I understand Drew is being considered for a position with the Merit Systems Protection Board. I also understand this position would require him to adjudicate personnel disputes and it's likely that some of these disputes would involve LGBT personnel.

I met Drew through Kira in approximately 2011. I've interacted with Drew several times at dinners, brunches and barbecues. My partner (now husband) has always been present at these occasions, so I'm sure Drew knows I'm gay. I have never observed or even suspected any anti-LGBT bias from Drew. For example, my husband and I held a small barbecue at our house several years ago. Drew, Kira and their infant daughter Emery spent several hours at our house and Drew seemed perfectly at ease. There were other gay people at this small gathering, and I never detected any discomfort from Drew with being around gay people.

Drew's wife Kira was a colleague of mine at the Social Security Administration for the entire time I worked there (about six years). She is gay-friendly and has always expressed support for me and my husband personally and for gay people in general. I don't have any reason to believe that Drew's attitudes are any different.

Drew has always struck me as highly intelligent and professional. Based on my interactions with him, I have no doubt that he is able to treat LGBT people with empathy, respect and fairness in any situation, including MSPB adjudications.

Thank you,

/s/ William H. Owen

A black rectangular redaction box covering the signature area.

**Opening Statement of Carmen Guerricagotia McLean  
Nominee to be an Associate Judge of the District of Columbia Superior Court  
July 19, 2018**

Mr. Chairman and members of the Committee, I am deeply grateful for the opportunity to appear before you as you consider my nomination to be an Associate Judge of the Superior Court of the District of Columbia. It is a great honor to be nominated and considered for this position. I would like to thank the Judicial Nomination Commission and its chair, the Honorable Emmet Sullivan, for recommending me to the White House, and the President for nominating me. I also would like to thank Congresswoman Norton for her support. Finally, I would like to express my sincere thanks and appreciation to the Committee members and the dedicated Committee staff for their hard work, for considering my nomination, and for the courtesy and professionalism they have extended to me throughout this process.

Here with me today is my husband, William Carson McLean, to whom I am immeasurably grateful for his unwavering encouragement, and my children, eight year old Coen and five year old Cait, who inspired me to reach for my dream of becoming a judge. I love you all dearly. I would also like to recognize my mother, Marcia Rush, also here with me today; my sister, Darcy Guerricagotia, a Lieutenant Commander in the United States Navy; and other members of my family who have been endlessly supportive and are watching from afar. Finally, I would like to acknowledge the many friends and colleagues, several of whom are here today, who have guided and encouraged me in a myriad of ways over the years. Thank you all for your kind and unwavering support.

In August of 1998, I moved from rural Oregon to the District of Columbia to attend Georgetown University Law Center and I have lived here ever since. In 2001, I began working just a few blocks from here, at Washington office of Jones Day, an international law firm. During my nearly seventeen years at Jones Day, I have been privileged to work with many brilliant, strategic, and hard-working attorneys; represent influential and innovative clients in a variety of industries, including digital music, automotive, and pharmacology; and work on large scale litigation matters involving complex and novel legal issues. I am extremely grateful for the lessons I have learned through these experiences and from my talented colleagues, and for the honor of working at Jones Day.


During my time at Jones Day I have also dedicated a great deal of time to pro bono and public service matters impacting citizens of the District of Columbia. While I have worked on a range of matters, I have spent the vast majority of my time in the service of at-risk children who need safe, permanent, and loving homes. Through these matters, I saw first-hand the impact of our justice system on individual lives and was motivated to further my public service. Through this work, I also frequently appeared before District of Columbia Superior Court judges who demonstrated a mastery of relevant laws, rules, and procedures; treated all litigants with dignity and respect; maintained high standards for counsel; were deliberate in their application of the law to the facts; and provided thoughtful and timely decisions. If I am fortunate enough to be confirmed, that is exactly the type of judge I will work very hard to be.

Again, thank you for the opportunity to appear today. I am humbled to be considered for this position, and I look forward to answering your questions.

**REDACTED**

**QUESTIONNAIRE FOR NOMINEES TO THE DISTRICT OF COLUMBIA COURTS  
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS,  
UNITED STATES SENATE**

**I. BIOGRAPHICAL AND PROFESSIONAL INFORMATION**

1. **Full name (include any former names used).**  
Carmen Guerricagoitia McLean (formerly Carmen May Guerricagoitia).
2. **Citizenship (if you are a naturalized U.S. citizen, please provide proof of your naturalization).**  
I am a citizen of the United States.
3. **Current office address and telephone number.**  
Jones Day  
51 Louisiana Avenue, NW  
Washington, D.C. 20001  
202-879-3744
4. **Date and place of birth.**  
September 25, 1976; Ontario, OR.
5. **Marital status (if married, include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**  
I am married to William Carson McLean, an Assistant Director in the Office of Clearance and Settlement of the Division of Trading and Markets of the United States Securities and Exchange Commission, 100 F Street, NE, Washington, D.C. 20549.
6. **Names and ages of children. List occupation and employer's name if appropriate.**  
 **REDACTED**
7. **Education. List secondary school(s), college(s), law school(s), and any other institutions of higher education attended; list dates of attendance, degree received, and date each degree was received. Please list dating back from most recent to earliest.**  
Georgetown University Law Center, Washington, D.C.; September 1998 – May 2001;  
Juris Doctor awarded 2001.

George Fox University, Newberg, Oregon; September 1994 – May 1998; Bachelor of Science awarded 1998.

Keble College, Oxford University, Oxford, United Kingdom; June 1997 – August 1997; no degree awarded.

Coalition of Christian Colleges and Universities, Washington, D.C.; August 1996 – December 1996; no degree awarded.

Portland Community College, Portland, Oregon; June 1996 – August 1996; no degree awarded.

Rainier High School, Rainier, Oregon; August 1991 – June 1994; High School Diploma awarded June 1994.

Burns High School, Burns, Oregon; August 1990 – June 1991; no degree awarded.

8. **Employment record. List all jobs held since college, other than legal experience covered in question 16, including the dates of employment, job title or description of job, and name and address of employer. Please list dating back from most recent to earliest. If you have served in the US military, please list dates of service, rank or rate, serial number, and type of discharge received.**

September 1998 – May 1999  
Georgetown University Law Center  
600 New Jersey Avenue, NW  
Washington, D.C. 20001  
Library Work Study

9. **Honors and awards. List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.**

Best Lawyers in America: Litigation – Antitrust (2016, 2017, 2018)

D.C. Rising Star, *National Law Journal* (2015)

Pro Bono Lawyer of the Year, District of Columbia Bar (2012)

Champion of the Legal Profession, *National Law Journal* (2011)

Outstanding Recent Alumna, George Fox University (2004)

*Summa Cum Laude* designation upon graduating from George Fox University (1998)



10. **Business relationships.** List all positions currently or formerly held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business enterprise, or educational or other institution.

Capitol Hill Cluster School Parent Teacher Association  
Board (2014 – 2017)

Children's Law Center  
Emeritus Board (2015 – present)  
Board of Directors (2009 – 2015)  
Advisory Board Chair (2010 – 2011)

BEST Kids  
Board of Directors (2008)

11. **Bar associations.** List all bar associations, legal or judicial-related committees, conferences, or organizations of which you are or have ever been a member, and provide titles and dates of any offices which you have held in such groups.

American Bar Association  
Member (2001 – present)  
Antitrust Section (2008 – 2016)

Oregon State Bar House of Delegates  
Delegate (2005 – 2008)

Oregon Bar Association  
Member (2001 – present)

District of Columbia Bar Association  
Member (2002 – present)

12. **Other memberships.** List all memberships and offices currently and formerly held in professional, business, fraternal, scholarly, civic, public, charitable, or other organizations, other than those listed in response to Question 11. Please indicate whether any of these organizations formerly discriminated or currently discriminates on the basis of race, sex, or religion.

Capitol Hill Cluster School  
Parent Teacher Association (2013 – present)

Georgetown Journal on Poverty Law & Policy  
Editorial Staff (1999 – 2001)

Law Students in Court Clinical Program  
Student (1999 – 2000)

George Fox University  
Associated Student Community Vice President (1997 – 1998)

None of these organizations formerly or currently discriminate based on race, sex or religion.

13. **Court admissions. List all courts in which you have been admitted to practice, with dates of admission and lapses in admission if any such memberships have lapsed. Please explain the reason for any lapse in membership. Please provide the same information for any administrative bodies which require special admission to practice.**

Oregon Bar, admitted October 24, 2001.  
District of Columbia Bar, admitted April 8, 2002.  
U.S. Court of Appeals for the District of Columbia Circuit, admitted February 9, 2005.  
U.S. District Court for the District of Columbia, admitted July 10, 2006.  
U.S. District Court for the Eastern District of Michigan, admitted April 4, 2016.  
None of these memberships have lapsed.

14. **Published writings. List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited.**

Co-Author, *Noteworthy Trends from Cases Decided Under the Recently Amended Federal Rules of Civil Procedure*, Jones Day Commentary (September 2016).

Author, *Relief from ESI Over-Preservation*, Metropolitan Corporate Counsel (December 2015).

Co-Author, *Significant Changes to the Federal Rules of Civil Procedure Expected to Take Effect December 1, 2015: Practical Implications and What Litigators Need to Know*, Jones Day White Paper (September 2015).

Co-Author, *Proposed Changes to the Federal Rules of Civil Procedure*, Jones Day White Paper (March 2014).

Co-Author, *Will Recent Court Approval of Computer-Assisted Document Review Spur Acceptance in Antitrust Investigations?*, Jones Day Alert (March 2012).

Author, *Innovation Does Not Cure Constitutional Violation: Charitable Choice and the Establishment Clause*, Georgetown Journal on Poverty Law & Policy, Vol. VIII (Summer 2001).

15. **Speeches.** List the titles of any formal speeches you have delivered during the last five (5) years and the date and place where they were delivered. Please provide the Committee with four (4) copies of any of these speeches.

I have not given any formal speeches in the last five years, but I have taught numerous continuing legal education courses. I list those courses below.

November 3, 2016: Co-Presenter, *The Federal Rules of Civil Procedure a Year Later: The Latest Decisions and other Developments*, West LegalEd, Webcast. Powerpoint presentation supplied.

January 21, 2016: Panelist, *The 2016 Amendments to the FRCP, Part II: Rule 26, Proportionality, Judicial Intervention, and Mastering the Discovery Juggernaut*, American Bar Association, Webcast. PowerPoint presentation supplied.

October 29, 2015: Presenter, *E-Discovery-2015: Recent Decisions and Practical Implications for All Attorneys*, West LegalEd, Webcast. PowerPoint presentation supplied.

June 18, 2015: Co-Presenter, *The Role of Social Media in E-Discovery: Current Developments for All Attorneys*, West LegalEd, Webcast. PowerPoint presentation supplied.

June 24, 2014: Co-Presenter, *Cross Border E-Discovery*, West LegalEd, Webcast. PowerPoint presentation supplied.

January 29, 2014: Presenter, *On Notice: Using Proposed Changes to the Federal Rules of Civil Procedure to Inform Preservation and Litigation Strategies Now*, West LegalEd, Webcast. PowerPoint presentation supplied.

June 11, 2013: Presenter, *Is There A Middle Ground Between Document Over Preservation and Allegations of Spoliation? An Analysis for In-House and Corporate Counsel*, West LegalEd, Webcast. PowerPoint presentation supplied.

May 16, 2013: Panelist, *New Antitrust Challenges for U.S. Companies Around the Globe*, Jones Day, Washington, D.C. PowerPoint presentation supplied.

August 22, 2012: Co-Presenter, *Nuts and Bolts of Computer-Assisted Document Review: A Primer for All Attorneys*, West LegalEd, Webcast. PowerPoint presentation supplied.

April 25, 2012: Co-Presenter, *Rule 26(f) Conferences: How to Prepare & What to Discuss*, West LegalEd, Webcast. PowerPoint presentation supplied.

**16. Legal career.**

**A. Describe chronologically your law practice and experience after graduation from law school, including:**

- (1) Whether you served as a law clerk to a judge, and if so, the name of the judge, the court, and the dates of your clerkship;**

I have never served as a law clerk to a judge.

- (2) Whether you practiced alone, and if so, the addresses and dates;**

I have never practiced alone.

- (3) The dates, names, and address of law firms, companies, or governmental agencies with which you have been employed.**

June 1998 – August 1998  
Gary M. Bullock and Associates, P.C.  
1000 SW Broadway, Suite 2460  
Portland, OR 97205  
Legal Assistant and Receptionist

June 1999 – August 1999  
Judge Advocate General Corps  
U.S. Army Garrison Ansbach  
Katterbach, Germany  
Civilian Intern

September 1999 – May 2000  
Becket Fund for Religious Liberty  
1200 New Hampshire Avenue, NW, Suite 700  
Washington, D.C. 20036  
Intern/Work Study

May 2000 – August 2000  
Stoel Rives, LLP  
760 SW 9th Avenue  
Portland, OR 97205  
Summer Associate

October 2000 – May 2001  
Jones Day  
51 Louisiana Avenue, NW  
Washington, D.C. 20001

Law Clerk

October 2001 – present  
 Jones Day  
 51 Louisiana Avenue, NW  
 Washington, D.C. 20001  
 Partner (January 2011 – present)  
 Associate (October 2001 – December 2010)

**B. Describe the general character of your law practice, dividing it into periods with dates if its character has changed over the years.**

I have spent the entirety of my legal career at Jones Day working as a corporate litigator and trial attorney. Although I have developed a deep knowledge of certain substantive areas, including contracts, copyright, tort, and antitrust, I consider myself a generalist with well-developed litigation skills, including expertise in civil procedure, discovery, and motions practice, that are applicable across substantive practice areas.

From the time I joined Jones Day in October 2001 through approximately August 2002, I was a member of a team that arbitrated a non-public contract dispute between two software companies. In that matter, I shared responsibility for discovery, witness and exhibit preparation, demonstratives, and pre and post-arbitration briefing.

From approximately winter 2002 through approximately November 2006, I focused primarily on a copyright matter related to the streaming of digital music on the internet. I was a key member of this team litigating issues of first impression from discovery through motions in *limine*. During this period I began my work for at-risk children in the District of Columbia by acting as first chair in at least two representations each of which included multiple status hearings and a bench trial.

From November 2006 through March 2010, the bulk of my time was split between three matters. First, a criminal investigation by the Department of Justice related to price fixing and bid rigging in the marine hose industry and the ensuing class action lawsuits. Second, a trial matter in the United States District Court for the District of South Carolina related to issues of contract interpretation and successor liability. Third, a dispute in the Circuit Court of the Fifteenth Judicial Circuit of Florida regarding the alleged violation of a non-competition agreement and misappropriation of trade secrets. During this period I also regularly appeared in Superior Court hearings or trials related to the permanency of at-risk children in the District of Columbia, including first chairing a custody trial before Superior Court Judge J. Michael Ryan that spanned six days.

From March 2010 through fall 2016, the majority of my work focused on a large-scale criminal investigation by the Department of Justice related to price fixing and bid rigging in the automotive industry and the ensuing class action lawsuits. I spent substantial time negotiating with counsel representing the Department of Justice and civil plaintiffs, drafting motions, and defending depositions. During the same period, I appeared at hearings and trials in Superior Court for seven matters related to the permanency of at-risk children in the District of Columbia. In these representations, I led teams of junior attorneys with the goal of helping them develop litigation skills, including case strategy and presentation of arguments and evidence at hearings and trials.

From fall 2016 to the present, the focus of my work has been advising a Fortune 500 pharmaceutical company regarding litigation readiness. Additionally, I have represented two pro bono clients: a United States Army Combat Medic who returned from three deployments in Afghanistan with a traumatic brain injury and post-traumatic stress disorder related to a criminal charge and a single father of four who resided in substandard living conditions. Both representations were in the Superior Court of the District of Columbia. Finally, I have overseen the pro bono, public service, and diversity efforts for Jones Day's Washington Office.

**C. Describe your typical former clients and describe the areas of practice, if any, in which you have specialized.**

Throughout my career my billable clients have almost exclusively been large companies involved in high-stakes litigation. These representations have spanned multiple substantive areas. My pro bono clients are predominately individuals or families who want to provide a safe and permanent home to at-risk children in the District of Columbia.

**D. Describe the general nature of your litigation experience, including:**

**(1) Whether you have appeared in court frequently, occasionally, or not at all. If the frequency of your court appearances has varied over time, please describe in detail each such variance and give applicable dates.**

During my career I have regularly appeared in Federal court, District of Columbia Superior Court, and before arbitrators. I first-chaired several trials in Superior Court related to the permanency of at-risk children. I second-chaired a multi-day trial related to a contract dispute in the United States District Court for the District of South Carolina. In addition to the above trial matters, I second-chaired many hearings in the Circuit Court of the Fifteenth Judicial Circuit of Florida and United States District Court for the Southern District of New York. I also regularly appeared in Superior Court for status hearings and evidentiary hearings in adoption,

custody, guardianship, and neglect matters.

**(2) What percentage of these appearances was in:**

- (a) Federal courts (including Federal courts in D.C.);**
- (b) State courts of record (excluding D.C. courts);**
- (c) D.C. courts (Superior Court and D.C. Court of Appeals only);**
- (d) other courts and administrative bodies.**

My practice has been approximately 95 % in Federal courts and 5 % in the Superior Court for the District of Columbia.

**(3) What percentage of your litigation has been:**

- (a) civil;**
- (b) criminal.**

My practice has been approximately 95 % civil and 5 % criminal, and I have been involved in numerous settlements.

**(4) What is the total number of cases in courts of record you tried to verdict or judgment (rather than settled or resolved, but may include cases decided on motion if they are tabulated separately). Indicate whether you were sole counsel, lead counsel, or associate counsel in these cases.**

I estimate that I have tried 15 matters to verdict in Federal court or Superior Court. I served as lead counsel in approximately 13 of these matters and was associate counsel in the remaining matters.

**(5) What percentage of these trials was to**

- (a) a jury;**
- (b) the court (include cases decided on motion but tabulate them separately).**

All 15 matters that I have tried to verdict in Federal court or Superior Court were bench trials.

17. Describe the five (5) most significant litigated matters which you personally handled. Provide citations, if the cases were reported, or the docket number and date if unreported. Give a capsule summary of the substance of each case and a succinct statement of what you believe was of particular significance about the case. Identify the party/parties you represented and describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case, (a) the date of representation; (b) the court and the name of the judge or judges before whom the case was litigated; and (c) the name(s) and address(es) and, telephone number(s) of co-counsel and of the principal counsel for the other parties.

1. In re Auto. Parts Antitrust Litig., 50 F. Supp. 3d 836 (E.D. Mich. 2014) and In re Auto. Parts Antitrust Litig., 50 F. Supp. 3d 869 (E.D. Mich. 2014)

In February 2010, the United States Department of Justice ("DOJ") and the Federal Bureau of Investigation raided Yazaki Corporation and Yazaki North America, Inc. (collectively, "Yazaki") and served a grand jury subpoena alleging price fixing and bid rigging of automotive parts. The DOJ characterized this matter as involving the world's largest price fixing cartel. Yazaki, a major supplier of automotive wire harnesses, was one of the first parties raided. Immediately after its raid, Yazaki retained Jones Day to defend the criminal investigation and resulting civil litigation. In October 2011, the first of what would eventually be over 40 class action complaints was filed on the basis of the DOJ's allegations. These complaints were later consolidated into a multidistrict litigation in the Eastern District of Michigan. U.S. District Court Judge George Caram Steeh oversaw the criminal plea, and U.S. District Court Judge Marianne O. Battani is overseeing the civil multidistrict litigation.

To resolve the criminal case, in January 2012, Yazaki agreed to pay a \$470 million criminal fine, one of the largest fines in the history of the DOJ's Antitrust Division. In the subsequent months, six Yazaki employees, all foreign nationals, agreed to enter plea agreements that required substantial prison terms. Despite the severity of these penalties, it was a very successful result for Yazaki in light of the facts and volume of commerce at issue. We have settled with the four civil plaintiff groups (the amounts of the settlements are confidential).

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2. In re Marine Hose Antitrust Litig., 531 F. Supp. 2d 1381 (J.P.M.L. 2008)

On May 1, 2007, the United States Department of Justice ("DOJ") and the Federal Bureau of Investigation conducted a raid at a meeting of suppliers of marine hose held in Houston, Texas. After that raid, the head of marine hose business for Parker Hannifin Corporation and Parker ITR, S.r.l. (collectively, "Parker") was arrested and Parker was served with a grand jury subpoena in the Southern District of Texas before United States District Court Judge Sim Lake, that alleged that Parker had been a part of a conspiracy to rig bids and fix prices for marine hose. Parker promptly retained Jones Day to represent the company. In the days and months that followed the raid, competition authorities in Europe, Japan, Korea, Australia, and Brazil initiated their own investigations into competition in the marine hose industry. Private litigants filed suit in the United States,

and the suits were consolidated into a multidistrict litigation in the Southern District of Florida before United States District Court Judge Donald L. Graham. While litigating the multidistrict litigation, we conducted fact and expert document and deposition discovery and filed dispositive briefs. We negotiated a plea agreement with the DOJ, settled with the civil litigants in the United States, avoided threatened litigation in Europe, and resolved the civil governmental investigations in Japan, Korea, Australia, and Brazil.

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3. Reed Elsevier, Inc., et. al. v. Henry E. Asher, et. al. (Fifteenth Jud. Circ. Ct. of Fl. 2009)

Reed Elsevier Inc., a large publishing company, purchased Seisint, a personal information database business created by Henry E. Asher, for \$775 million on August 31, 2004. The purchase agreement included a non-competition agreement with an exception for Mr. Asher's charitable work for the National Center for Missing and Exploited Children and law enforcement agencies. Following the deal, Mr. Asher went on to create a new company and a new personal information database. Reed Elsevier claimed that Mr. Asher had violated the non-competition terms of the purchase agreement and misappropriated business secrets by creating a database that Reed Elsevier alleged was in direct competition with Reed Elsevier and its affiliates. Jones Day was hired by Asher mid-litigation, after Mr. Asher had terminated several other firms. There were several pending motions in the Circuit Court of the Fifteenth Judicial Circuit of Florida that required briefing and a variety of outstanding discovery requests that required immediate action. Approximately two months after we took over the matter, the parties agreed to settle on terms that were favorable for Mr. Asher. Judge David E. French of the Fifteen Judicial Circuit Court of Florida presided over the matter.

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4. Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 746 F. Supp. 2d 692 (D.S.C. 2010), Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 791 F. Supp. 2d 431 (D.S.C. 2011), Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 791 F. Supp. 2d 431 (D.S.C. 2011), Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 763 S.E.2d 19 (S.C. 2014)

PCS Nitrogen purchased several fertilizer facilities and related assets. One of the assets was a large piece of land on the Ashley River near Charleston, South Carolina, where a fertilizer plant was previously operated. PCS Nitrogen sold the land, which was later designated as a Superfund site due to contamination that occurred during the operation of the fertilizer plant. Eventually that land was acquired by a land development company, which could not develop the land unless it undertook an expensive effort to remediate the environmental issues. In Ashley II of Charleston, LLC v. PCS Nitrogen, before Judge C. Weston Houck of the U.S. District Court of the District of South Carolina, the development company sued PCS Nitrogen seeking damages for the cost of remediation. PCS Nitrogen engaged Jones Day to defend the litigation. We filed counterclaims against officers and directors of the company who owned the land at the time the fertilizer plant was in operation. The issues for trial were predominately contract interpretation, successor liability and tort.

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 202-296-1665

Counsel for Plaintiffs:

Joseph Rutledge Young, Jr. (deceased)

James Hartzell (retired)  
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5. Arista Records, LLC v. Launch Media, Inc., 578 F.3d 148 (2d Cir. 2009)

LAUNCHcast was an early online streaming music service that allowed users to indicate certain preferences (e.g., rating songs, artists and albums). The Recording Industry Association of America filed suit against LAUNCHcast on behalf of several of its members, four of the five major record labels, to argue that the degree of user influence rendered LAUNCHcast “interactive” and, as a result, LAUNCHcast should have negotiated individual licenses with the owners of the copyrighted works. LAUNCHcast argued before Judge Richard Owen of the U.S. District Court for the Southern District of New York, that the user influence was insufficient to render LAUNCHcast “interactive” and, as such, Launch was permitted to exercise the statutory license provided by the Digital Music Copyright Act (“DMCA”). This case was the first to address the issue of interactivity under the DMCA and had a significant impact on the development of music distribution over the internet. Launch engaged Jones Day to defend the litigation.

Plaintiffs argued infringement of thousands of sound recordings (i.e., the performance of a song rather than the separately copyrightable music and lyrics) and, if plaintiffs were able to prove infringement, statutory damages would have been substantial. In the course of discovery, I recognized that most record labels claimed ownership of sound recordings as “works made for hire,” a form of copyright ownership that requires specific factual elements. I determined that the plaintiffs’ claims of ownership of most of the allegedly infringed works failed for one or more reasons. We engaged experts to testify about my factual analysis as well as to provide supporting evidence about the recording industry that was relevant to challenging plaintiffs’ ownership. On this basis, we filed a motion *in limine* to challenge plaintiffs’ right to allege infringement of works that were subject to one of the identified defects. We won that motion. Yahoo! decided to transition the matter to another firm for trial. The case was tried using the facts and arguments I developed with my Jones Day colleagues and the jury found that LAUNCHcast was not interactive. That decision was upheld by the Second Circuit.

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Counsel for Plaintiffs:

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Counsel for Recording Industry Association of America:

Dean C. Garfield  
Information Technology Industry Council  
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18. Describe the most significant legal activities you have pursued, including significant litigation which did not proceed to trial or legal matters that did not involve litigation. Describe the nature of your participation in each instance described, but you may omit any information protected by the attorney-client privilege (unless the privilege has been waived).

I have taken several leadership positions in Jones Day's Washington office.

Since October 2015, I have co-chaired the Diversity Committee. In that role I have evaluated diversity in the Washington office of Jones Day and defined priorities for the future, including creation of a women's initiative focused on addressing retention of women, expanding our pro bono work into areas that serve the LGBTQ community, and training lawyers about implicit biases that may impact how they view and/or communicate with colleagues, clients, witnesses, judges, and jurors.

Since August 2014, I have been the Partner in Charge of Pro Bono and Public Service. In that role I encourage my colleagues to engage in pro bono work, help colleagues identify pro bono matters that satisfy their interests and goals, evaluate the merit and scope of all potential pro bono engagements, plan service events in the community, chair our committee on pro bono and public service, and coordinate opportunities to discuss

ongoing pro bono work and the firm's relationships with various pro bono and public service organizations in the District of Columbia.

In 2010, recognizing the need to ensure that our lawyers were properly trained regarding electronic document discovery, including the technological and legal issues associated with electronic document discovery, I requested permission to create a training program. Through this program I have trained more than 300 Jones Day attorneys during more than 40 continuing legal education programs in areas such as litigation holds, collection, cost and timing considerations, ethics, Federal Rule of Civil Procedure 26(f) conferences, spoliation, social media, predictive coding, search terms, negotiating agreements with opposing counsel, and current judicial treatment of issues related to electronic document discovery. As a result of my efforts, I became the E-Discovery Partner in Jones Day's Washington office and partners and clients throughout the United States consult me on issues related to complex document discovery.

Finally, I have dedicated over 3,000 hours to representing pro bono clients in the District of Columbia. This time has been exclusively on matters in Superior Court and predominately related to securing safe and permanent homes for at-risk children in the District.

19. **Have you ever held judicial office? If so, please give the details of such service, including the court(s) on which you served, whether you were elected or appointed, the dates of your service, and a description of the jurisdiction of the court. Please provide four (4) copies of all opinions you wrote during such service as a judge.**

No.

- A. **List all court decisions you have made which were reversed or otherwise criticized on appeal.**

20. **Have you ever been a candidate for elective, judicial, or any other public office? If so, please give the details, including the date(s) of the election, the office(s) sought, and the results of the election(s).**

No.

21. **Political activities and affiliations:**

- **List all public offices, either elected or appointed, which you have held or sought as a candidate or applicant.**

None.

- **List all memberships and offices held in and services rendered to any political party or election committee during the last ten (10) years.**

None.

- Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity during the last five (5) years of \$50 or more.

None.

22. To your knowledge, have you ever been investigated, arrested, charged, or convicted (include pleas of guilty or nolo contendere) by federal, State, local, or other law enforcement authorities for violations of any federal, State, county, or municipal law, other than for a minor traffic offense? If so, please provide details.

No.

23. Have you or any business of which you are or were an officer, director or owner ever been a party or otherwise involved as a party in any other legal or administrative proceedings? If so, give the particulars. Do not list any proceedings in which you were merely a guardian ad litem or stakeholder. Include all proceedings in which you were a party in interest, a material witness, were named as a co-conspirator or co-respondent, and list any grand jury investigation in which you appeared as a witness.

No.

24. Have you ever been disciplined or cited for a breach of ethics for unprofessional conduct by, or been the subject of a complaint to any court, administrative agency, bar or professional association, disciplinary committee, or other professional group? If so, please provide the details.

No.



## II. POTENTIAL CONFLICTS OF INTEREST

1. **Will you sever all connections with your present employer(s), business firm(s), business association(s), or business organization(s) if you are confirmed?**

Yes.

2. **Describe all financial arrangements, deferred compensation agreements, or other continuing dealings with your law firm, business associates, or clients.**

Each March, Jones Day sets my compensation for that calendar year. My compensation is distributed in the form of a monthly draw that is a set amount and does not vary by year. The remainder of that year's income is paid the following year at various percentages in January, April, June, September and December. Each year I make a capital investment in Jones Day. I have confirmed that when I resign my partnership, my unpaid income and my capital investment will be returned to me save a retainer to pay taxes for certain states and international jurisdictions where Jones Day files aggregated returns for partners (this does not include taxes to the United States of America, the District of Columbia, and California, which I pay individually). I will also continue to have the retirement benefits accrued during my time at Jones Day: a 401K retirement plan and a pension. Estimated amounts for these accounts, my capital account, and my unpaid compensation are included in response to Question III.1, below.

3. **Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest.**

None.

4. **Describe any business relationship, dealing, or financial transaction which you have had in the last ten (10) years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest other than while in a federal government capacity.**

None.

5. **Describe any activity during the last ten (10) years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of legislation or affecting the administration and execution of law or public policy other than while as a federal government employee.**

As a parent and a member of the Capitol Hill Cluster School Parent Teacher Association Board of Directors ("PTA"), I testified before the District of Columbia Council at two separate hearings. In February 2017, I requested that funding be allocated for a shuttle bus between two campuses of the Capitol Hill Cluster School. In April 2017, I testified regarding the investment of funds the PTA made into the Capitol Hill Cluster School.

6. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service as a judge? If so, explain.

No.

7. Explain how you will resolve any potential conflicts of interest, including any that may have been disclosed by your responses to the above items. Please provide three (3) copies of any trust or other relevant agreements.

I foresee no potential conflict of interest. If one were to arise I would resolve it pursuant to the District of Columbia Code of Judicial Conduct.

8. If confirmed, do you expect to serve out your full term?

Yes.

**III. FINANCIAL DATA**

**All information requested under this heading must be provided for yourself, your spouse, and your dependents. (This information will not be published in the record of the hearing on your nomination, but it will be retained in the Committee's files and will be available for public inspection.)**

**REDACTED**

## IV. DISTRICT OF COLUMBIA REQUIREMENTS

Supplemental questions concerning specific statutory qualifications for service as a judge in the courts of the District of Columbia pursuant to the District of Columbia Court Reform and Criminal Procedure Act of 1970, D.C. Code Section 11-1501 (b), as amended.

1. Are you a citizen of the United States?  
Yes.
2. Are you a member of the bar of the District of Columbia?  
Yes.
3. Have you been a member of the bar of the District of Columbia for at least five (5) years? Please provide the date you were admitted to practice in the District of Columbia.  
Yes, April 8, 2002.
4. If the answer to Question 3 is "no" --
  - A. Are you a professor of law in a law school in the District of Columbia?
  - B. Are you a lawyer employed in the District of Columbia by the United States or the District of Columbia?
  - C. Have you been eligible for membership in the bar of the District of Columbia for at least five (5) years?
  - D. Upon what grounds is that eligibility based?
5. Are you a bona fide resident of the District of Columbia?  
Yes.
6. Have you maintained an actual place of abode in the greater Washington, D.C. area for at least five (5) years? Please list the addresses of your actual places of abode (including temporary residences) with dates of occupancy for the last five (5) years.

Yes.



7. **Are you a member of the District of Columbia Commission on Judicial Disabilities and Tenure or the District of Columbia Judicial Nominating Commission?**

No.

8. **Have you been a member of either of these Commissions within the last 12 months?**

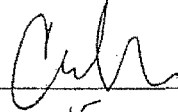
No.

9. **Please provide the committee with four (4) copies of your District of Columbia Judicial Nomination Commission questionnaire.**

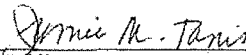
See attached.

## AFFIDAVIT

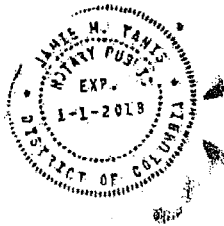
Carmen Guerricagoitia McLean being duly sworn, hereby states that he/she has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his/her knowledge, current, accurate, and complete.



SUBSCRIBED and SWORN TO before me this 15 day of November 2017.



Notary Public



JAMIE M. TANIS  
NOTARY PUBLIC DISTRICT OF COLUMBIA  
My Commission Expires January 1, 2018

**U.S. Senate Committee on Homeland Security and Governmental Affairs  
Pre-hearing Questionnaire  
For the Nomination of Andrew F. Maunz to be  
Member (to be designated Vice Chairman), Merit Systems Protection Board**

**I. Nomination Process and Conflicts of Interest**

1. Did the President give you specific reasons why he nominated you to serve as Vice Chairman of the Merit Systems Protection Board (MSPB)?  
  
No.
2. Were any conditions, expressed or implied, attached to your nomination? If so, please explain.  
  
No.
3. Have you made any commitments with respect to the policies and principles you will attempt to implement as Vice Chairman of the MSPB? If so, what are they, and to whom were the commitments made?  
  
No.
4. Are you aware of any business relationship, dealing, or financial transaction that could result in a possible conflict of interest for you or the appearance of a conflict of interest? If so, please explain what procedures you will use to recuse yourself or otherwise address the conflict. And if you will recuse yourself, explain how you will ensure your responsibilities are not affected by your recusal.

I have no business relationships, dealings, or financial transactions that would cause a conflict of interest in this position. In addition, there is nothing else that causes a fundamental conflict of interest that would interfere in my ability to serve in this position. I will consult the appropriate ethics officials on the standards for recusal on any particular case. As I mentioned previously in my biographical questionnaire, it is possible that cases that involve work I was personally involved in at SSA may require me to recuse myself. Also, due to the fact that my wife is a current federal employee (attorney at SSA), it is possible I might have to recuse myself from any cases that come before the MSPB, directly involving her, either personally or as an attorney representing a party. I believe that the chances that a case would come before the Board under either of these scenarios is slim. On the rare chance that I must recuse myself from a specific case, I would leave it up to my fellow MSPB members to make the decision without me. Otherwise, my responsibilities at the MSPB would not be affected.

## **II. Background of the Nominee**

5. What specific background and experience affirmatively qualify you to be Vice Chairman of MSPB?

I have been involved in the full spectrum of employment law in the federal government. I have litigated employment cases in a wide variety of forums, including before the MSPB. I have trained agency managers on employment issues, and I have researched and provided the agency guidance on the types of employment issues that the MSPB must decide.

In addition to my employment law experience, I have been involved in several other aspects of administrative law, such as drafting agency regulations and policies that will assist me in my duties at the MSPB.

6. What experience, if any, do you have in deciding cases, resolving disputes, or performing the other duties required in serving as Vice Chairman of the MSPB?

As someone litigating cases, I have always had to evaluate the strengths and weaknesses of each side's case, which is similar to what a member of the MSPB must do to decide cases. I have also successfully resolves many cases through settlements. This has involved working with the other side to find common ground and ways we can resolve often contentious cases.

I have also been heavily involved in SSA's Freedom of Information Act (FOIA) workload in recent years. When a FOIA case is made to the agency, the agency issues an initial decision and an appeal decision before the requester can challenge the agency's decision in federal court. One of my roles as an SSA attorney has been to review these decisions for legal sufficiency and to ensure the agency is issuing a legally correct decision in response to the FOIA request.

Furthermore, SSA's Office of the General Counsel has delegated authority to issue decisions in cases where employees are seeking a waiver of an overpayment and in requests for testimony under the *Touhy* process. In my capacity as an attorney at SSA, I have been involved in deciding these requests.

7. Please describe:

- a. Your leadership and management style.

I am someone that believes true leaders lead by example and set a positive tone for all the other individuals in their organization through their own positive behavior.

As far as managing the work of others and delegating tasks, I believe it is important to let all individuals know that, whatever they are doing, they are playing an important role in the ultimate process of completing the task. I believe that the best managers make sure



their subordinates feel that they are able to contribute their own talents and perspectives to a project. It is important to stay engaged with the people you are managing to ensure the tasks are completed timely and correctly, but I believe that you must trust their abilities and not micromanage.

b. Your experience managing personnel.

I have served as an acting division director on many occasions. I have also led projects and organized trainings when I have had to get many people on the same page to complete the task. In addition, I often review other attorneys' work when requested to provide constructive feedback and try to serve as a resource and mentor for newer attorneys in my office.

c. What is the largest number of people that have worked under you?

When serving as an acting division director, I have been responsible for about 5-7 attorneys and 1 paralegal.

### **III. Role of Vice Chairman, MSPB**

8. The Civil Service Reform Act requires that individuals appointed to the MSPB "demonstrate[] [the] ability, background, training, or experience" necessary to "carry out functions of the Board."<sup>1</sup> Please describe how your abilities, background, training, and experience qualify you for the position of Vice Chairman of the MSPB.

As discussed above in question 5, I have ample experience with the types of employment law issues the MSPB handles. I believe that I am a skilled lawyer who can analyze several complex legal issues at the same time, which will help me in deciding cases at the MSPB. In addition to my training as a lawyer, I have attended several trainings specific to MSPB issues.

9. In your opinion, what is the role of the MSPB? What is the role of Vice Chairman in carrying out the statutory objectives of the MSPB?

As an administrative agency, the MSPB's role is laid out by statutes. Primarily, it is to decide the various cases it has the authority to decide within the bounds of the relevant legal authorities. A large portion of the MSPB workload is to review federal agencies' major disciplinary actions to ensure they are lawful and have not violated the employee's rights. It also plays an important role in protecting whistleblowers, keeping the federal workforce free of partisan political activity on government time, preventing of prohibited personnel practices, and other important functions by reviewing personnel actions and applying the law as written. The MSPB also has the authority to conduct studies and review Office of Personnel Management regulations.

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<sup>1</sup> 5 U.S.C. § 1201.

While the Chairman has the authority to run the administration of the MSPB, the Vice Chairman's role is to provide support and advice to the Chairman in fulfilling these tasks, when needed. The Vice Chairman must also be ready to serve as Acting Chairman when necessary.

10. MSPB's mission is to "protect the Merit System Principles and promote an effective Federal workforce free of Prohibited Personnel Practices." How do you envision fulfilling MSPB's mission both day-to-day, and long-term?

Day-to-day, the most important way for the MSPB to fulfill its mission is to issue decisions that apply the law as it is written. Long term, the MSPB can fulfill its mission by establishing clear precedents that closely follow the text of the law. This will allow employees and agencies to have a clear picture of the legal landscape when they make their decisions.

11. What do you anticipate being the greatest challenge you would face as Vice Chairman of the MSPB, and how would you seek to prepare for and address those challenges?

The greatest challenge currently facing the MSPB is the number of cases currently waiting for a decision. As Vice Chairman, I would address this challenge by working as hard as possible to issue legally correct decisions as quickly as I can. I will also be willing to explore innovations and changes that could help the MSPB issue more decisions quickly.

12. What do you believe to be the top challenges facing the federal workforce today? What steps do you plan to take to address these challenges, if confirmed as Vice Chairman? Please explain.

This question largely focuses on policy, which is the domain of the Office of Personnel Management. The MSPB's primary role in addressing any issue in the federal workforce is to issue legally correct decisions. It also can help identify current and potential issues through the studies it has the authority to conduct.

13. Do you believe you will review and adjudicate cases that come before you with good judgment and impartiality? Please explain, citing examples of prior work or experience that could bear on your abilities, if applicable.

Yes, as discussed above, when litigating cases and providing SSA advice, I have had to look at the situation from an impartial perspective to make sure I am considering all issues and perspectives. I have also had to perform some of my work from a neutral standpoint, like the FOIA decisions I mentioned.

I believe the people I work with view me as someone who is level-headed and has good judgment. I am known in my office as someone who can look at issues and problems

from a calm perspective and as someone who is able to review the facts and the law to reach the right conclusion, without my personal preferences entering into the analysis.

#### **IV. Policy Questions**

14. What role do you think alternative dispute resolution options, including the Mediation Appeals Program, should play in the MSPB adjudication and enforcement process?

Alternative dispute resolution, including mediation, plays an important role in nearly all litigation these days. Mediation can be an effective way to resolve disputes without the costs of a trial. I personally have participated in mediation in attempts to resolve disputes on multiple occasions. There are different techniques for mediation and I believe that some techniques are more effective than others. As Vice Chairman, I would work to make sure that the MSPB's mediation program uses the most effective approaches to resolve cases and allows all parties involved to feel that the mediation was a productive use of time.

15. MSPB is statutorily responsible for conducting oversight of the Office of Personnel Management's significant actions. How will you coordinate with OPM to ensure any significant actions conform to the merit systems principles outlined in 5 U.S.C. § 2301?

5 U.S.C. § 1204(f) allows the MSPB to review OPM rules and regulations "after the effective date." Also, 5 U.S.C. § 1206 states that the MSPB's annual report will review the significant actions of OPM. The best way for the MSPB to ensure that OPM's actions conform to merit systems principles is to use these authorities to conduct meaningful oversight of OPM's actions.

16. MSPB previously highlighted the need to examine the prevalence and forms of reprisal for protected activity, particularly for whistleblowing.<sup>2</sup> Do you view reprisal for whistleblowing as a significant challenge facing the federal workforce? Why or why not?

I believe that whistleblowers play an important role in identifying malfeasance in the federal government. If an individual makes a protected whistleblower disclosure or engages in protected whistleblower activities, he or she should be protected from retaliation to the fullest extent the law allows. Any illegal reprisal against whistleblowers is significant and should be remedied immediately. I do not have access to the data at this time to determine how many of these incidents occur throughout the federal government.

17. In your opinion, is the underutilization of probationary periods a critical issue? If confirmed as Vice Chairman of MSPB, what steps would you take to ensure that managers better utilize probationary periods?

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<sup>2</sup> Merit Systems Protection Board, MSPB Research Agenda 2015-2018 (Feb. 2015), *available at* <https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=1140540&version=1145045&application=ACROBAT>.

This is a workforce management issue that should be left to OPM. I would decide any cases involving probationary periods in accordance with the applicable legal standards.

18. How do you view the role of information technology at MSPB as it relates to both day-to-day business and the overall mission objectives to uphold merit systems principles?

Information technology plays an important role in both how the agency decides cases and how it conducts agency business. As a practitioner, I have always been impressed with the MSPB's electronic case filing system. I believe the MSPB should explore all avenues in how information technology can allow it to hold more hearings and process cases quicker.

Information technology can also enhance the way the agency communicates with its employees across the country. I believe to the greatest extent possible the MSPB should be using technologies like video teleconferencing to allow its offices to communicate with each other and save on costly travel.

19. What role do you think merit systems studies, published by MSPB, play in ensuring a competent and efficient federal workforce?

These studies play an important role in identifying and examining emerging issues in the federal government. I believe they can be an important tool for agencies, OPM, Congress, and the White House in developing policies for the federal government workforce.

- a. What steps would you take to ensure that MSPB's external reports address critical federal workforce issues?

The best step that can be taken is to solicit feedback from outside MSPB to see which issues stakeholders in this field want to see studied. The MSPB members can take what has been suggested from the outside, as well as ideas from inside the MSPB, and use it to develop an agenda that is relevant to the federal government community.

- b. What, if any, coordination do you believe should occur between MSPB and OPM to address federal workforce issues raised by MSPB studies?

Ultimately, as the policy making agency, OPM has the responsibility to use these studies to determine what policies it should implement. However, I believe the MSPB should solicit feedback from OPM, as it would other interested parties, on what areas it would like to see studied and what information it thinks the MSPB should collect in order to study a particular area.

20. According to MSPB's Fiscal Year 2017 annual report, 22 percent of MSPB employees, including 25 percent of administrative judges, are eligible to retire in the next two years.

What steps will you take to ensure that MSPB conducts its own succession planning, so that you are able to execute your statutory duties?

The MSPB should periodically review all succession planning to ensure that it is up to date on the realities of its workforce. It should also work to make sure it is recruiting the best people to come work at the MSPB. In addition to succession planning and recruitment, the MSPB should also examine what, if any, changes it can make to its case processing that would allow it to process more cases with fewer people.

21. In March 2018, MSPB published an updated survey on sexual harassment in the federal workforce.<sup>3</sup> In this survey, 20.9 percent of women in the federal workforce and 8.7 percent of men experienced a type of sexual harassment in the two years preceding the survey.<sup>4</sup> Only eight percent of these employees believed corrective action was taken against the individual who committed the harassment, possibly resulting in employees not using agency procedures to report the harassment.<sup>5</sup> What do you believe is the role of MSPB in ensuring accountability against harassers in the federal workplace and in ensuring employees can report harassment without reprisal?

The MSPB's primary role is in reviewing the disciplinary cases of the harassers and issuing clear, predictable decisions in accordance with the law.

The law also makes it clear that it is illegal to engage in reprisal against someone who reports harassment. The MSPB can help remedy this situation by issuing decisions in the cases that come before it that clearly uphold the law and state that illegal reprisal will not be tolerated in the federal government.

22. What steps can MSPB take to improve federal supervisors' knowledge and intra-agency support regarding disciplinary and removal processes?

In order to inform not just supervisors, but the public in general, the best step the MSPB can take is to issue clear decisions that can be understood by a layperson, and not create a disciplinary process that is more complicated than the law requires. The MSPB can also continue to engage in outreach at federal government conferences and other events in order to let supervisors, employees, agency attorneys, and plaintiffs' attorneys know about the latest developments in this field.

23. Protecting whistleblower confidentiality is of the utmost importance to this Committee.
- a. During your career how have you addressed whistleblower complaints?

<sup>3</sup> Merit Systems Protection Board, Update on Sexual Harassment in the Federal Workforce (Mar. 2018), available at <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1500639&version=1506232&application=ACROBAT>.

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Id.* at 8.

I believe that all whistleblower complaints should be taken seriously and a thorough examination of the facts should take place to determine what happened. My firsthand experience with whistleblower issues consists of an administrative law judge (ALJ) discipline case where a whistleblower defense was raised briefly, but not central to the case. I also assisted in the SSA's production of documents for an Office of Special Counsel investigation. I also did extensive research and wrote an internal SSA white paper of the issue of federal employees' First Amendment rights, which often coincide with whistleblower issues. Also, while not specific to whistleblowers, I have trained managers on retaliation and reprisal issues and informed them that they should not base any personnel actions on illegal retaliatory motives.

- b. How do you plan to implement policies within the MSPB to encourage employees to bring constructive suggestions forward without the fear of reprisal?

I believe in having an open door policy where employees can come to me with suggestions, concerns, and criticisms. I am not someone who is easily offended by someone disagreeing with me or having different views. I will welcome all perspectives at the MSPB, and any illegal reprisal will not be tolerated.

- c. Do you commit without reservation to work to ensure that any whistleblower within MSPB does not face retaliation?

Yes.

- d. Do you commit without reservation to take all appropriate action if notified about potential whistleblower retaliation?

Yes.

#### **V. Relations with Congress**

24. Do you agree without reservation to comply with any request or summons to appear and testify before any duly constituted committee of Congress if you are confirmed?

Yes, consistent with the law and applicable rules and regulations.

25. Do you agree without reservation to make any subordinate official or employee available to appear and testify before, or provide information to, any duly constituted committee of Congress if you are confirmed?

Yes, consistent with the law and applicable rules and regulations.

26. Do you agree without reservation to comply fully, completely, and promptly to any request for documents, communications, or any other agency material or information from any duly constituted committee of the Congress if you are confirmed?

Yes, consistent with the law and applicable rules and regulations.

V. Assistance

27. Are these answers your own? Have you consulted with MSPB or any other interested parties? If so, please indicate which entities.

The answers are my own. I shared a draft with acting MSPB Chairman Mark Robbins and MSPB staff to allow them to review.

**Minority Supplemental Pre-hearing Questionnaire  
For the Nomination of Andrew Felton Maunz to be  
Member (to be designated Vice Chairman), Merit Systems Protection Board**

**I. Nomination Process and Conflicts of Interest**

1. Has the President or his staff asked you to sign a confidentiality or non-disclosure agreement?

No.

2. Has the President or his staff asked you to pledge loyalty to the President or the Administration?

No.

3. Have you ever represented a party in a matter before or involving the Merit Systems Protection Board (MSPB)?

a. If so, please describe the matter(s) and the nature of the representation.

Yes. Since these are administrative proceedings, I am providing initials of the names of the litigants, unless there is a public decision of the case, in order to protect these individuals from public scrutiny.

- SSA v. JP, Docket No. CB-7521-13-0004-T-1: I represented SSA in this ALJ discipline case, which settled.
- SSA v. McQuary, Docket No. CB-7521-11-0003-T-1: I represented SSA in this ALJ discipline case.  
<https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=736991&version=739597&application=ACROBAT>.
- DM v. SSA, Docket No. PH-0432-10-0028-I-1: I briefly entered an appearance to represent the agency in this performance removal case, but soon left the case to deal with other more pressing workloads.
- TL v. SSA, Docket No. PH-0752-09-0463-I-1: I represented the agency in this suspension case, which settled.
- LB v. SSA, Docket No. DE-0752-08-0436-A-1: I represented the agency in this litigation over attorney fees after the individual had successfully got her removal overturned. I did not represent the agency in the original action challenging the removal.

4. Have you ever represented the Social Security Administration in a matter involving the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Privacy Act of 1974, or the Equal Access to Justice Act?

a. If so, please describe the matter(s) and the nature of the representation.



Yes, these four laws were listed in the first paragraph of the complaint in the case of *Ridgell-Boltz v. Astrue/Colvin* No. 2010-cv-00252. I began representing the agency in this case as a Department of Justice Special Assistant United States Attorney/ Special Attorney in September 2011. Under this status, I was working under the authority and supervision of the civil chief of the New Mexico U.S. Attorney's Office. A colleague and I represented the agency at a jury trial in the summer of 2012. I served as the second chair attorney at the trial. I also represented the agency in two appeals of the case to the 10<sup>th</sup> Circuit (*Ridgell-Boltz v. Colvin* No. 12-1495 and *Ridgell-Boltz v. Colvin* No. 15-1361). I continued to serve as the agency's counsel in the case until early 2017 when the case was finally resolved after I negotiated a settlement with the plaintiff and her counsel.

**Civil Rights Act of 1964, Age Discrimination in Employment Act, and other civil rights laws.**

I have represented the agency in several other cases that involve these laws in litigation before the Equal Employment Opportunity Commission. I am listing the cases I have handled before the EEOC that involve these civil rights laws below. As I did with the MSPB cases, I am listing the litigants' names as initials.

- African American Males Class Action, EEOC No. 531-2013-00129X. I have represented the agency for the past several years as the lead attorney in this multi-million dollar class action case that stems from a finding the agency breached a settlement agreement to resolve the original class action.
- RA v. SSA, EEOC No. 531-2009-0056X
- LB v. SSA, Petition No. 0320100006
- RJ v. SSA, EEOC No. 531-2010-00095X
- RK v. SSA, EEOC No. 531-2011-00027X
- EK v. SSA, EEOC No. 531-2008-00174X
- HM v. SSA, EEOC No. 531-2009-00244X
- HM v. SSA, EEOC No. 531-2011-00309X
- HR v. SSA, EEOC No. 531-2008-0228X
- DS v. SSA, EEOC No. 531-2008-00298X
- LB v. SSA, EEOC No. 541-2010-00033X
- DL v. SSA, EEOC No. 541-2010-00023X
- MS v. SSA, EEOC No. 570-2009-00769X
- CS v. SSA, EEOC No. 531-2009-00243X
- SB v. SSA, EEOC No. 460-2012-00002X

**Privacy Act of 1974**

- Robinson, et al. v. SSA, Civil No. 11-10524-GAO. I did not enter an appearance in the case, but I assisted the Assistant US Attorney in defending the agency in this Privacy Act case.

**Equal Access to Justice Act**

EAJA primarily serves to provide attorney fees to litigants who are litigating against the federal government. Most of the cases I am involved in feature laws that have specific provisions providing attorney fees, so I have not directly handled any cases where EAJA was an issue. It was only briefly mentioned in the Ridgell-Boltz case.

**II. Accountability**

5. During your career, has your conduct as a federal employee ever been subject to an investigation or audit by CIGIE, Office of Special Counsel, Equal Employment Opportunity Commission, Department of Justice, or any other federal investigative entity? If so, please describe the investigation or audit and its outcome.

No.

**III. Publications and Speeches**

6. Please describe the purpose and name of your blog:  
wherehaveyougonemargeschott.blogspot.com.

The purpose of the blog was just to be a fun way for me and my friend to talk about sports and to serve as a distraction from law school. It was quickly abandoned because we both got too busy.

The name was a take-off of the line "Where have you gone Joe DiMaggio?" from the Simon and Garfunkel song "Mrs. Robinson." The name was supposed to be a tongue in cheek reference to how long-suffering Ohio sports fans (my friend was a Cleveland Browns fan and I was a Cincinnati Reds and Bengals fan) often long for the "good old days," even if the people who led the teams in those days were controversial, like Marge Schott. The name in no way was meant to celebrate Mrs. Schott, nor condone any of her behavior or statements.

7. Do you maintain any other public blog(s)? If so, please share the appropriate links to each.

No.

**IV. Background of Nominee**

8. Have you represented a whistleblower or other employee in an adversarial dispute against the federal government?

No.

9. Do you seek out dissenting views and how do you encourage constructive critical dialogue with subordinates?

Yes, please see my answer to question 23b of the majority questionnaire.

10. Please give examples of times in your career when you disagreed with your superiors and aggressively advocated your position. Were you ever successful?

While I am not sure I disagreed with my superiors or “aggressively advocated” my position, one situation that I can think of where I was able to convince not just my immediate supervisors, but also agency executives, to take an action they may not have taken otherwise is when I convinced the agency to ask for an opinion from the Department of Justice Office of Legal Counsel (OLC) on the legality of an EEOC order. I advocated my idea at several levels of the agency and was able to convince all relevant individuals that this was the right course of action. Ultimately, OLC agreed with my position and issued an order in the agency’s favor. <https://www.justice.gov/opinion/file/833591/download>

11. What would you consider your greatest successes as a leader?

I consider my greatest success as a leader the securing of the OLC opinion I described above in question 10. I truly feel that I was able to lead the agency to a result that it likely would not have otherwise pursued.

12. Why do you want to serve as Vice Chairman of MSPB?

It would be a great opportunity to serve in such an important role in our government and to help ensure that our civil service laws are applied properly.

13. What type of managerial style do you think is necessary for the role of Vice Chairman of MSPB?

I believe that the Vice Chairman of the MSPB should lead by example and set the tone for the agency by conducting himself with integrity. Please also see my answer to question 7a of the majority questionnaire.

14. If an accusation of discrimination were to arise within an office under your management, what actions would you take to address such an accusation?

I would ensure that the allegations are processed under the appropriate procedures in accordance with MSPB’s policies for handling discrimination claims.

15. Do you have experience addressing instances of prohibited personnel practices (PPPs)? If so, please generally describe your experience.

As described above, I have litigated numerous discrimination cases before the EEOC.

16. Do you have any experience adjudicating matters? If so, please provide an example.

Yes, please see my answer to question 6 of the majority questionnaire.

17. How will your experience help MSPB maintain MSPB's Merit System Principles (MSPs)?

My experience in the federal government has given me first-hand experience in how important it is that MSPs are maintained and that the federal government operates under the highest standards. Using this background, I will be able to take the necessary actions to maintain MSPs.

18. What lessons from your time as a Senior Attorney with the Social Security Administration (SSA), will you bring with you to MSPB, if confirmed?

My experience with SSA has not only given me familiarity with many of the laws that the MSPB administers, but also has given me experience for how agencies actually operate. I have learned lessons about the challenges agencies face in managing their workforce and also about the perspectives that many employees have. Familiarity with these issues will be invaluable to my work with the MSPB, if I am confirmed.

#### V. Policy Questions

19. Precedents, findings, recommendations and reviews of Office of Personnel Management (OPM) rules by the MSPB have potential to directly affect how employees are managed and how their appeals are decided. What role do you believe the MSPB should play in developing personnel policy?

The role of the MSPB is to issue legally correct decisions. Other agencies are responsible for developing personnel policies.

20. The MSPB has the statutory responsibility to conduct objective, non-partisan studies that assess and evaluate Federal merit systems policies, operations, and practices. These studies are typically government-wide in scope and ensure that the workforce is managed in accordance with MSPs and is free from PPPs. What role do you believe MSPB's data collection should play in supporting personnel policy?

My understanding is that the data the MSPB collects for its studies is available to policy makers to use to make their decisions.

21. MSPB has been without a quorum of Board members since January 8, 2017. The lack of a quorum contributes to delays in issuing final decisions in petitions for review (PFRs) and other cases filed at headquarters (HQ) and releasing reports of merit systems studies.

- a. The MSPB currently estimates that it will take months or longer to process the inventory of cases at HQ and to publish merit systems studies reports once new

Board members are nominated and confirmed. Please describe how you will effectively and promptly address MSPB's current backlog.

One of the first things that I believe the newly confirmed members of the MSPB should do is develop a plan to try to address the backlog as quickly as possible. Personally, I am committed to working as quickly as possible so the agency can issue cases as fast as it can.

- b. Please describe how your previous work experience has prepared you to address the challenges in resolving MSPB's backlog.

While at SSA, one of the main focuses of the agency during my career has been reducing the number of cases pending for a hearing before an ALJ. Therefore, I am familiar with an agency working to reduce its backlog and have been involved in some of the agency's efforts to process cases faster. In particular, I have been involved in providing legal guidance for the agency's policies concerning the claimants' representatives that appear before the agency. Many of these policies have been focused on the agency's ability to process cases quickly. As examples, I have worked with the agency to implement new regulations, clarify the agency's submission of evidence rules, and require representatives to use the agency's electronic services in certain situations.

- c. The MSPB Vice Chairman has voted on over 800 PFR cases which also await consideration by new Board members. If confirmed, please describe how you will work with your colleagues to consider cases awaiting decisions.

As I stated above, I believe my colleagues and I should immediately work on a plan to tackle the number of cases pending before the MSPB.

- d. Do you have experience with resolving backlogs such as the one faced by MSPB? If so, please describe your experience.

Yes, my experience with SSA as described above in the answer to 21b.

- e. Have you sought advice from any current or former MSPB employees about how to best address the current backlog? If so, please describe your consultations.

The current acting Chairman Mark Robbins has generally explained the situation to all of the nominees.

22. MSPB functions as an independent, third-party adjudicatory authority for employee appeals of adverse actions (e.g., removals, suspensions for more than 14 days, and furloughs) and retirement decisions.

- a. Please describe your experience in developing adjudicatory processes and procedures, issuing subpoenas, calling witnesses and enforcing decisions.

In addition to my litigation experience that I have already described, I have worked to help develop the adjudicatory processes SSA uses to disqualify claimants' representatives from appearing before the agency. *See* 20 C.F.R. §§ 404.1700-.1799. I have also handled actions to disqualify representatives from practice before SSA. In those actions, I have requested subpoenas and implemented the agency's decision to disqualify the representative.

- b. Please describe how your previous work experience has prepared you to execute and supervise these actions at MSPB.

I have a variety of experience litigating in various forums. This experience has prepared me for fulfilling my role at the MSPB.

23. How should Board members seek to safeguard their independence?

The best way for Board members to safeguard their independence is to issue decisions that are based on nothing more than the appropriate legal standards and to only issue decisions that are based on their best judgment, not the pressures from any outside forces.

24. MSPB was given the authority and responsibility to review the rules, regulations, and significant actions of OPM. Do you have any concerns about OPM's current rules, regulations or recent actions? If so, please describe those concerns.

I would have to better familiarize myself with all of OPM's rules, regulations, and significant actions before I could answer this question.

25. Do you believe MSPB has the resources it needs to meet current challenges? Please explain.

I am not in a position to answer this without more information on the internal workings of the MSPB and its current resources.

26. How will you address the occurrence of PPPs with internal employees of MSPB?

MSPB managers should be trained appropriately so that PPPs do not occur in the first place. If there are allegations of PPPs at the MSPB, I would ensure that the complaint is handled properly in accordance with the MSPB's processes.

27. In some cases, complainants who may be better served by other government agencies such as the EEO or OSC seek assistance from the MSPB.

- a. How will you work to ensure that your staff effectively guides these complaints to the appropriate resources?

Make sure staff reroutes cases that are not in the MSPB's jurisdiction quickly and efficiently.

- b. Will you collaborate with other government agencies to minimize duplication? If so, please describe how you will work to achieve this objective.

I believe agencies should communicate with each other and the public to ensure that the appropriate cases are filed with the correct agency.

#### *Hatch Act*

28. What would you consider to be an appropriate penalty for a violation of the Hatch Act by a senior administration official?

While I am not sure what you mean by "senior administration official," most individuals who would fall under that term are exempted from the MSPB's Hatch Act jurisdiction. The penalty for any Hatch Act violation should depend on the facts of the case.

#### *Whistleblower protections*

29. Please describe any previous experience—in the public or private sector—with handling whistleblower complaints, and what steps you took to ensure those individuals did not face retaliation and that their claims were thoroughly investigated?

Please see my answer to question 23a of the majority questionnaire.

30. OSC has filed an amicus brief opposing an MSPB decision that ruled against a whistleblower alleging retaliation because the MSPB said the whistleblower's disclosure was motivated by "interpersonal squabbling." Do you believe that the motive of the whistleblower should be considered when examining retaliation claims? Please explain.

I am not familiar with that specific case and would need to examine the issue in more detail before I can opine.

31. OSC filed three amicus briefs in 2017 opposing the MSPB's alleged attempts to impose higher procedural burdens on whistleblowers. Do you believe that whistleblowers should be subjected to higher procedural burdens before their cases are considered by administrative judges? Please explain.

I am not familiar with that specific case and would need to examine the issue in more detail before I can opine.

32. OSC has also filed amicus briefs opposing the application of higher evidentiary burdens on whistleblowers. OSC has written that this burden "runs directly counter to Congress's intent in passing the WPEA's enhanced protections for federal whistleblowers." Do you believe that any whistleblowers should be subjected to higher evidentiary burdens? Please explain.

I am not familiar with that specific case and would need to examine the issue in more detail before I can opine.

33. If confirmed, how will you ensure that whistleblower complaints are properly investigated?

The Office of Special Counsel has the responsibility for investigating whistleblower complaints. MSPB can ensure that the complaints are properly investigated by using its authority under 5 U.S.C. § 1212(b)(3)(A) to enforce OSC subpoenas.

#### **VI. Relations with Congress and the Public**

34. If confirmed, how will you make certain that you will respond in a timely manner to Member requests for information?

Yes, consistent with the law and applicable rules and regulations.

35. If confirmed, do you agree without reservation to reply to any reasonable request for information from the Ranking Member of any duly constituted committee of the Congress?

Yes, consistent with the law and applicable rules and regulations.

36. If confirmed, do you agree without reservation to reply to any reasonable request for information from members of Congress?

Yes, consistent with the law and applicable rules and regulations.

37. If confirmed, do you commit to take all reasonable steps to ensure that you and your agency comply with deadlines established for requested information?

Yes, consistent with the law and applicable rules and regulations.

38. If confirmed, do you commit to protect subordinate officials or employees from reprisal or retaliation for any testimony, briefings or communications with members of Congress?

Yes, consistent with the law and applicable rules and regulations.



39. If confirmed, will you ensure that your staff will fully and promptly provide information and access to appropriate documents and officials in response to requests made by the Government Accountability Office (GAO) and the Congressional Research Service?

Yes, consistent with the law and applicable rules and regulations.

40. If confirmed, will you agree to work with representatives from this Committee and the GAO to promptly implement recommendations for improving MSPB's operations and effectiveness?

Yes, consistent with the law and applicable rules and regulations.

41. If confirmed, will you direct your staff to fully and promptly respond to Freedom of Information Act requests submitted by the American people?

Yes, consistent with the law and applicable rules and regulations.

42. If confirmed, will you ensure that political appointees are not inappropriately involved in the review and release of Freedom of Information Act requests?

Yes, consistent with the law and applicable rules and regulations.

#### **VII. Assistance**

43. Are these answers your own? Have you consulted with MSPB or any other interested parties? If so, please indicate which entities.

The answers are my own. I provided a draft to acting MSPB Chairman Mark Robbins and the staff of the MSPB for their review.

I, Andrew F. Mamm, hereby state that I have read the foregoing Pre-Hearing Questionnaire and Supplemental Questionnaire and that the information provided therein is, to the best of my knowledge, current, accurate, and complete.

Andrew Mamm  
(Signature)

This 11th day of July, 2018

Senator Gary Peters  
Post-Hearing Questions for the Record  
Submitted to Carmen G. McLean

**Nominations of Dennis D. Kirk to be Chairman of the Merit Systems Protection Board,  
The Honorable Julia A. Clark to be a Member of the Merit Systems Protection Board,  
Andrew F. Maunz to be a Member of the Merit Systems Protection Board, and Carmen G.  
McLean to be an Associate Judge of the Superior Court of the District of Columbia  
Thursday July 19, 2018**

1. Ms. McLean, you stated that you decided at the age of five to dedicate your life to public service. Since then, you've spent your entire legal career in a corporate litigation practice and your career and published writings have been rewarded with honors and awards such as the Best Lawyers in America 2016-2018, D.C. Rising Star, and the Pro Bono Lawyer of the Year. The day-to-day business of the DC Superior Court certainly differs in significant ways from your practice as a litigator. **What experiences, professional or otherwise, will you bring to bear when presiding over matters before the Superior Court?**

I appreciate the opportunity to provide additional information about my background and experience. Respectfully, I would like to clarify the portion of my testimony summarized in the question. During my testimony before the Committee I noted that I wanted to be a lawyer from age five, that I have been very dedicated to public service during my 17 years in private practice, and that my extensive pro bono work is what motivates my desire to transition into full-time public service. During my meeting with Senate staff we spoke in greater detail about my personal background, why I entered private practice, and my desire to transition to full-time public service.

I believe my 17 years of litigation experience, including experience in the Superior Court, has prepared me well for an appointment to the Superior Court.

I have substantial experience in Superior Court. When I was named D.C. Bar Pro Bono Lawyer of the Year, it was in recognition of my thousands of hours of work in Superior Court on behalf of low-income residents of the District of Columbia. I am familiar with Superior Court's fast pace and varied docket. I know how quickly a judge there must pivot and I am comfortable doing so. My experience also gives me particular insight into the importance of pro se litigation in Superior Court. In fact, most of my clients would have been pro se had I not represented them. In addition, I am proud to say that in every one of my cases in Superior Court I obtained the result desired by my clients. Through my many appearances in Superior Court I learned a great deal about the type of judge that I would like to become should I be confirmed: I would like to work hard to master relevant laws, rules, and procedures; treat all litigants fairly and with dignity and

respect; maintain high standards for counsel before me; be deliberate in my application of the law to the facts; and provide thoughtful and timely decisions.

Throughout my career as a trial attorney I have represented clients in complex litigation, trials, and arbitrations in both federal and state courts. I have been fortunate to have a diverse range of experiences which I would bring to bear should I be confirmed. First, I bring with me substantial courtroom experience as I have had many opportunities to first and second chair trials, argue motions and evidentiary issues, and negotiate resolutions in both Federal and Superior Courts. Second, I have substantial experience in a broad range of subject matters, including antitrust, copyright, successor liability, contract interpretation, and client counseling on litigation readiness and electronic discovery. Through these experiences I have gained substantive expertise; learned how to efficiently locate, learn, and apply new areas of law to the facts of a particular matter; and learned to neutrally assess the strengths and weakness of legal arguments. Third, I have represented a broad range of clients, ranging from the firm's traditional corporate clients to the pro bono clients I routinely represented in Superior Court. Through these representations, I have learned how to adjust my methods of communication, both oral and written, as necessary, and counsel my clients regarding complicated legal and practical issues. Finally, I have both civil and criminal experience. In addition to the many civil lawsuits I have litigated, I have defended matters brought by the Department of Justice, grand juries, and United States Attorneys. I am confident that this diversity of experience has prepared me to efficiently and effectively address the wide variety of Superior Court dockets and litigants.

I also believe my personal qualities would make me an effective Superior Court judge. I have a strong commitment to serving my community, which I have demonstrated through my pro bono work and volunteer service to several District of Columbia non-profits. I believe that judicial independence is central to the role of the judge and fundamental to equal access to justice. My decisiveness, commitment to the rule of law, and respect for others would allow me to demonstrate a positive judicial temperament. And I am a leader and a person of integrity, as has been recognized by lawyers inside and outside of my firm who have placed me in leadership roles and selected me to receive various awards. I am humbled by the public support I have received from prominent partners at my law firm, over 50 lawyers whom I have mentored, the Solicitor General, a former Chief Judge of the Family Court, the Executive Director of the Children's Law Center, the District of Columbia Hispanic Bar Association, and the District of Columbia Asian Pacific American Bar Association.

Should I be confirmed, I would bring to bear 17 years of litigation experience, including my extensive practice in the District of Columbia Superior Court, and the personal qualities described above. The combination makes me well suited to serve as a Superior Court judge.

KERRI S. KUHLMANN

July 16, 2018

Via electronic delivery

Hon. Ron Johnson, Chairman  
 Hon. Claire McCaskill, Ranking Member  
 Hon. Committee Members  
 Homeland Security and Governmental Affairs Committee  
 United States Senate  
[whistleblower@ronjohnson.senate.gov](mailto:whistleblower@ronjohnson.senate.gov)  
[\[REDACTED\]@HSGAC.senate.gov](mailto:[REDACTED]@HSGAC.senate.gov)  
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[\[REDACTED\]@HSGAC.senate.gov](mailto:[REDACTED]@HSGAC.senate.gov)

RE: Hearing on the President's Nominations to the Merit Systems Protection Board:  
 Addressing MSPB's Practice of Concealing Identities of Federal Agency Officials  
 Who Violate Whistleblower Protection Laws

Dear Senator Johnson, Senator McCaskill, and Committee Members:

In your hearing on the President's nominations to the Merit Systems Protection Board (MSPB or Board), I respectfully request that the Committee ask the nominees whether, if confirmed, they will halt MSPB's unauthorized, unjust practice of protecting from public disclosure the identities of federal agency management officials who violate, or participate in violating, the Whistleblower Protection Act of 1989, as amended by the Whistleblower Protection Enhancement Act of 2012 (collectively, WPA).

#### I. Background

In or around 2014, the MSPB unilaterally decided to begin scrubbing from its published decisions the identities of all federal agency management officials who are named as wrongdoers or witnesses in Board appeals. *See, e.g., Ayers v. Department of the Army*, 123 M.S.P.R. 11 (2015) (MSPB disguised identities of agency management officials who violated WPA); *Thompson v. Department of the Army*, 122 M.S.P.R. 372 (2015) (MSPB concealed identities of agency management officials by referring only to their job titles). There is no legal or statutory authority, nor any legitimate public interest, justifying the MSPB's actions; rather, MSPB career employees implemented this practice of their own accord with the obvious goal of protecting agency managers with whom they sympathize.<sup>1</sup> *See* MSPB Judges Handbook, Ch. 2, Reviewing

<sup>1</sup> MSPB's so-called "administrative judges," who are merely MSPB career-employee-attorneys, are notoriously biased against whistleblowers, and rarely rule in their favor. *See, e.g.,*

the Appeal, 5. Pseudonymous Appeals, e. Non-Party Anonymity, and Ch. 12, Initial Decisions, 8. Sanitization of Initial Decisions.  
<https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=241913&version=242182&application=ACROBAT>. In brief, MSPB career employees decided that whistleblowers and other employees who appeal erroneous “initial decisions” to the full Board waive their right to privacy—as if they had a choice. *Id.* at Ch. 12, Sanitization of Initial Decisions. MSPB decided that whistleblowers “generally will not be granted anonymity,” even when “harm is likely” because the whistleblowers’ “identities are public information” and “public interest in the disclosure of parties’ identities” outweighs protecting the whistleblower. *Id.* at Ch. 2, 5.c.3.

In stark contrast to their treatment of whistleblowers—whose reputations they unreservedly expose to public scrutiny—MSPB career employees essentially invented, with no legal authority, enhanced privacy rights for misbehaving agency officials. MSPB attempts to rationalize those fictitious enhanced privacy rights by characterizing said agency officials—which include Senior Executive Service (SES) employees and career Agency heads—as “non-parties.” One need not be the proverbial “rocket scientist” to see the flaws in that rationalization.

With regard to MSPB’s specious assertion that agency heads, Senior Executives, and other agency managers are “non-parties” to whistleblower appeals in which they play a role, please consider MSPB whistleblower appeal Docket Number DC-1221-17-0437-W-1 (2017).<sup>2</sup> In that case, several high-level senior executives, including the agency head, were accused of violating the WPA, and testified as hearing witnesses. Some of those senior executives were afforded the agency’s alleged attorney-client privilege to avoid answering questions about the extent of the coaching they received from the agency’s lawyers, which included coordinating testimony and documentary evidence while the hearing was in progress. Plus, the accused SES-agency-head-witness, a Deputy Assistant Secretary, was the “deciding official” with regard to directing the litigation, and was responsible for rejecting all possibility of settlement. ***These are not the actions and privileges of “non-parties.”*** Moreover, even if those agency management officials could be described as “non-parties,” there still is no law, public policy, or Freedom of Information Act (FOIA) exemption justifying MSPB’s gratuitously granting them anonymity. Taxpayer-salaried public servants, especially agency managers and other high-level officials, do not have a privacy interest in the conduct of their official duties. This probably explains why the MSPB has not offered or identified any legitimately-applicable legal authority or “compelling need” justifying the masking of their identities. Thus, MSPB’s stated excuse for scrubbing public employees’ names from its published decisions is nothing less than career MSPB employees’ bald and illegitimate attempt to shield their fellow agency officials (and former clients and colleagues) from public scrutiny of their official conduct, and this practice must be stopped.

<https://www.hsgac.senate.gov/hearings/blowing-the-whistle-on-retaliation-accounts-of-current-and-former-federal-agency-whistleblowers> and <https://oversight.house.gov/hearing/five-years-later-review-whistleblower-protection-enhancement-act>. That bias perhaps stems from the fact that many of MSPB’s career employees previously worked as federal agency lawyers, and began their federal careers by defending bureaucratic misconduct. MSPB’s recently-devised practice of concealing agency managers’ identities further reveals that bias.

<sup>2</sup> Available upon request.

## II. Abuse of Discretion - MSPB's Actions Violate Public Policy and Undermine the WPA and Congressional Intent

American jurisprudence dictates that, *except in exceptional circumstances*, all material participants in a legal proceeding should be identified; a practice that discourages perjury and bias and promotes the appearance fairness. The public has a vested interest in ensuring transparency, openness, and oversight within the government and its legal systems.<sup>3</sup> Further, one of the WPA's cornerstone principles is to encourage federal employees to report government fraud, waste, and abuse, in exchange for which Congress promised that the WPA and MSPB will protect them from retaliation and hold accountable those who violate their rights.

Although it has been six years since Congress enacted the WPEA, would-be whistleblowers continue to hide in the shadows for fear of retaliation. The MSPB's practice of protecting retaliatory managers tells whistleblowers that the shadows are where they should stay, because even if they prove their case, their careers and reputations will be destroyed, while the public officials who retaliated against them will enjoy complete anonymity and freedom from consequences for their actions. *See* MSPB Judge's Handbook, at Ch. 2, 5.e. (MSPB disguises managers' names so that they are not "apparent to a reader unfamiliar with the facts of the case"). This puts whistleblowers at a severe disadvantage, deters whistleblowing and the public interest it serves, and thus undermines Congressional intent.

## III. Conclusion

Congress premised the WPA's protections on a federal employee's *disclosing* wrongdoing, because exposing government wrongdoing serves a legitimate public interest. MSPB career employees have turned that concept on its head with their unilateral decision to cease *disclosing* the wrongdoers' identities. This practice, which lays bare MSPB career employees' well-publicized pro-agency, anti-whistleblower bent, cannot withstand scrutiny and must be stopped. I hope you will agree.

Thank you for addressing this very important issue.

Sincerely,

*Kerri S. Kuhlmann*

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<sup>3</sup> See *Redschlag v. Department of the Army*, 89 M.S.P.R. 589, fn.1 (2001) (MSPB denied employee-appellant's request for anonymity and a protective order, claiming that FOIA mandates disclosure of MSPB proceedings); *Coons v. Department of the Treasury*, 85 M.S.P.R. 631, ¶23 (2000) (noting that FOIA policy does not favor sealing records, and FOIA exemptions must be narrowly construed).

July 18, 2018

The Honorable Ron Johnson  
Chairman  
Senate Committee on  
Homeland Security and Governmental Affairs  
42 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Claire McCaskill  
Ranking Member  
Senate Committee on  
Homeland Security and Governmental Affairs  
304 Dirksen Senate Office Building  
Washington, DC 20510

Dear Chairman and Ranking Member,

We are federal sector unions collectively representing over one million workers and we are writing today to express our opposition to the nominations of Andrew Maunz and Dennis Dean Kirk for the positions of Vice Chairman and Chair, respectively, for the Merit Systems Protection Board (MSPB). In addition, we are all unified in our unequivocal support for the nominee Julia Clarke, whose long and excellent service in the public good as a labor advocate and at the FLRA make her supremely qualified for this position on the MSPB.

Both the Vice Chair and Chair nominees clearly lack the experience that would make them qualified for these positions. Neither have spent considerable time representing employees or agencies before the MSPB and are notably lacking in significant experience with labor/employment/or personnel law. In fact, within his very sparse federal representation experience, the Vice Chair nominee, Andrew Maunz, received a scathing comeuppance from a District Court Judge for being unprofessional and lacking the temperament to conduct himself appropriately in his role as a representative of the Social Security Administration.

It was originally unclear, based upon his rather unrelated legal experience, why Dennis Kirk would even be considered for Chair of the MSPB. Through additional research we have learned of facts that leave us deeply concerned not just with the nominee's qualifications, but also about his possible connections to other ongoing investigations. Enough serious concerns have been raised by simply reviewing the public record that a much deeper Congressional investigation is warranted prior to considering this nomination.

Dennis Kirk is a partner in the law firm Schmitz & Socarras, LLP, which specializes in representing numerous foreign corporations and "investors," *including those in Russia*. The firm's website states that one area of representation is "regulatory compliance challenges" and includes a list of clients. One client is Sukhoi, a Russian aircraft manufacturing company with a long history of producing aircraft for the Soviet and now Russian Air Force. They also produce civilian aircraft, and like many Russian companies have historical roots in previous Soviet society. Sukhoi now has a parent company, United Aircraft Corporation, which was created in February 20, 2006 by Russian President Vladimir Putin in Presidential Decree No. 140.

Thus, funds received by the law firm of Schmitz and Socarras, LLP, from the subsidiary, Sukhoi, would have clear financial and management ties to the Putin-created company, United Aircraft. We do not know the scope of work performed by Dennis Kirk and/or his law firm on behalf of Sukhoi, or if it would require, for instance, filing as a foreign agent. However, nothing in the firm's description indicates that it performs the kind of work that would typically be performed by a qualified candidate for the MSPB.



In addition, there are troubling indications that Dennis Kirk's law partner, Joseph Schmitz, served as General Counsel to Erik Prince's organization, the Prince Group, served as a noted foreign policy advisor to the Trump campaign, and claimed during the election to be in possession of the missing 30,000 Hillary Clinton emails from a client, presumably of Kirk's law firm, known as "patriot". Considering this is a three-person law firm, his partner's long history of representing the interests of Russia should be noted, and Mr. Kirk's involvement in and/or enrichment from these activities merit further investigation.

Positions on the Merit Systems Protection Board afford the occupants access to extensive amounts of personal data on employees of the government. Just as we have expressed deep concern with the OPM data breach, we, and all federal employees, including those with all levels of security and sensitive clearances, need to be secure in the knowledge that the MSPB provides a fair and transparent venue for personnel appeals. We need to know that federal employees will not be compromised or silenced for speaking up as whistleblowers and not betrayed by political pressure from either party, or from any foreign influences, at the MSPB.

The Merit Systems Protection Board by comparison to many other federal agencies can seem to be a rather small, obscure agency; normally, it should be. The MSPB for the most part quietly handles personnel issues in federal employment. But, it plays a vital role in ensuring that merit principles apply and not political cronyism. The unusual connections of this three-partner law firm raise troubling questions about the nomination of Mr. Kirk for the position that essentially umpires terminations of federal employees, including those alleging retaliation for whistleblowing.

In conclusion, we do not feel that Dennis Kirk's background and professional career demonstrate appropriate experience for a position on the MSPB. Furthermore, his connections through his law firm to Joseph Schmitz and issues related to the Russia investigations, raise red flags about his placement in a position with oversight over federal employees and whistleblowers.

Sincerely,

American Federation of Government Employees (AFGE)  
 International Association of Fire Fighters (IAFF)  
 International Association of Machinists and Aerospace Workers (IAMAW)  
 International Brotherhood of Teamsters (IBT)  
 International Federation of Professional and Technical Engineers (IFPTE)  
 Marine Engineers' Beneficial Association (MEBA)  
 Metal Trades Department, AFL-CIO (MTD)  
 National Association of Government Employees, SEIU (NAGE)  
 National Federation of Federal Employees (NFFE)  
 National Weather Service Employees Organization (NWSEO)  
 Patent Office Professional Association (POPA)